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No. _____

In The

# Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT,

*Petitioner,*

v.

SHIRLEY A. BREEDEN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the threshold requirement of an "adverse employment action" for purposes of a retaliation claim under Section 704(a) of Title VII [42 U.S.C. § 2000e-3(a)] is met where, consistent with both prior and subsequent administrative reorganizations to keep pace with a continuing influx of students into one of the nation's largest school districts, the plaintiff is transferred from one office location to another but suffers no tangible effects in compensation, terms, conditions or privileges of her employment.

2. Whether the "reasonable belief of conduct made unlawful under Title VII" standard to establish "protected conduct" under Title VII's anti-retaliation provision [42 U.S.C. § 2000e-3(a)] is met where the plaintiff has complained of conduct that does not come close to being unlawful under Title VII's anti-discrimination provisions [42 U.S.C. § 2000e-2(a)(1)]?

## PARTIES TO THE PROCEEDINGS BELOW

The plaintiff, below, is Respondent Shirley Breeden. The defendant is Petitioner Clark County School District.

Other than these parties, no other parties to the proceeding, or parent or wholly-owned subsidiary corporations, are known or identified.

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## PETITION FOR WRIT OF CERTIORARI

The Clark County School District, by and through its counsel, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is not officially reported, but appears at *Breeden v. Clark County School Dist.*, No. 99-15522, 2000 WL 991821, at *1 (9th Cir. July 19, 2000) and is reprinted in the Appendix to the Petition for Writ of Certiorari ("App.") at pages 1-8. The decision of the United States District Court for the District of Nevada is not reported and is reprinted in the Appendix to the Petition for Writ of Certiorari at pages 9-23.

## JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on July 19, 2000. (App. 1-8) A petition for rehearing was denied on August 31, 2000. (App. 24) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job

> training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

## STATEMENT OF THE CASE

Respondent Shirley Breeden ("Breeden") sued Petitioner, Clark County School District ("School District"), for an alleged hostile work environment and retaliation. Breeden, a District administrator, objected to a two-sentence exchange between her supervisor and one of her subordinate employees during a staff meeting. This momentary exchange concerned a sexual comment that a job applicant had made and which was reported in a psychologist's pre-hire report. Breeden informally complained about the exchange and then filed an administrative charge. After her charge was determined to be unfounded, she filed this lawsuit, complaining that the exchange constituted "sexual harassment" and she was "retaliated against" for informally complaining.

The district court granted summary judgment. As to Breeden's harassment claim, the district court ruled that the alleged two-sentence exchange between her supervisor and the subordinate employee about the job applicant's comment in the pre-hire report did not constitute severe or pervasive harassment and thus did not create a hostile work environment. As to Breeden's retaliation claim, the district court ruled (a) that her belief that the momentary exchange about the pre-hire report subjected her to sexual harassment was not objectively reasonable

and (b) that she had not been subjected to any "adverse employment action."

Breeden appealed only the district court's ruling on her retaliation claim. In a two-to-one memorandum opinion (Judges Canby and Reinhardt in the majority, Judge Fernandez dissenting), the Ninth Circuit reversed. The panel majority applied the Ninth Circuit's newly articulated definition of "adverse employment action," set forth less than two weeks earlier in *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000). The Ninth Circuit expressly observed in *Ray* that "[t]he Circuits are currently split as to what constitutes an adverse employment action." *Id.* at 1240.

But rather than adopting one of the *two* definitions variously articulated by the other Circuit Courts, the Ninth Circuit *added* to the disagreement among the Circuits by adopting yet a *third* definition. As discussed below, the Ninth Circuit's new definition of "adverse employment action" is *significantly* more expansive than either of the two definitions adopted by the other Circuits. Those definitions impose "some threshold level of substantiality" before a personnel action can constitute an "adverse employment action" supporting a retaliation claim under Title VII. The Ninth Circuit's definition, in contrast, allows virtually any personnel action with which an employee disagrees to support a retaliation claim – even if that action has no material impact on the terms, conditions, or privileges of employment, as is the case here.

### Clark County School District And The Periodic Reorganization Of Its Human Resources Division

Clark County School District in Southern Nevada is one of the fastest-growing school districts in the nation.

Between 1991 and 1997, the District's student and employee populations each grew more than forty-percent. (ER 80-81, 134)[1] This phenomenal growth has required the District to continuously reassess how it operates and delivers educational services.

Breeden commenced work in the District's Personnel Department in 1984 as a secretary. (ER 2) As part of an administrative reorganization, the Department subsequently became the Human Resources Division, which is responsible for personnel functions for three classifications of employees: "Administrators" (mostly school principals), "Licensed Personnel" (mostly teachers), and "Support Staff" (aides, police/security, custodial personnel, secretarial personnel).

In 1989, as part of another administrative reorganization, Breeden was promoted to an administrative position, Director of Contract Services. (ER 40) Her primary responsibilities were overseeing the issuance and processing of contracts, leaves of absence, and retirement calculations and paperwork for Licensed Personnel. (ER 43)

The following year, in 1990, the Division underwent another reorganization. (ER 44) Breeden's duties involving Licensed Personnel were moved to another administrator, and her title changed from Director of Contract Services to Director of Support Staff Services. (ER 45) She now focused on budgeting, hiring, and responding to employment verification requests for Support Staff. (ER 240-441) A few months later, one of the other Directors of Support Staff Services left, so Breeden's new duties

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[1] "ER" cites are to the Excerpts of Record in the Ninth Circuit.

expanded to include the hiring process for school police officers. (ER 190, 192, 202, 238)

In 1992, further administrative reorganizations occurred, and the Human Resources Division took over the handling of unemployment claims from the Business and Finance Division. Support Staff unemployment claims were assigned to Breeden. (ER 47) Dr. George Ann Rice, the new Assistant Superintendent in charge of Human Resources, directed Breeden to try to further streamline and consolidate work in the Division. (ER 87)

The following year, in April 1993, Breeden again was directed to propose steps to eliminate overlap and inefficiencies within the Division. (ER 89) Later that year, the Family and Medical Leave Act (FMLA) went into effect. Breeden was assigned responsibility for processing FMLA leave requests by Support Staff. (ER 48)

The next year, in April 1994, Breeden was given the same directive – identify ways to improve Support Staff operations, including sharing responsibilities and reallocating duties. (ER 65) Breeden made no recommendations. (ER 197)

**Breeden's "Oppositional Activity"**

Six months later, in October 1994, the staff meeting that gave rise to this lawsuit occurred. (ER 202) Part of Breeden's duties in overseeing the school police officer hiring process included reviewing pre-hire psychological reports. (ER 202) Breeden reviewed one such report, which quoted an applicant as saying, "making love to you is like making love to the Grand Canyon." (ER 66-67) When she read the remark, it did not bother her, and she passed the report, and those for other applicants, on to her supervisor, Don Eldfrick, or her subordinate, Jim McIntosh. (ER 225, 302) Eldfrick was concerned about the

"Grand Canyon" remark and a racial remark in another report. (ER 66) He therefore scheduled a staff meeting to review the reports with Breeden and McIntosh. (ER 66-67) Eldfrick had been Breeden's supervisor for approximately two and one-half years. They had a good working relationship, and Breeden had never heard Eldfrick make any comments of a sexual nature. (ER 50, 51, 53)

During this meeting, Eldfrick read aloud, verbatim, references in four reports that concerned him, including the "Grand Canyon" remark, and directed follow-up steps. (ER 66) Breeden claims that Eldfrick then said, without expression, "I don't know what that means," that McIntosh replied, "I'll tell you later," and that both men gave a "short chuckle." (ER 203-205, 50) Breeden claims she was embarrassed. (ER 49, 204-205)

After the meeting, Breeden told her secretary about the "Grand Canyon" remark and repeated Eldfrick's and McIntosh's exchange. (ER 50) Breeden then told Dr. Edward Goldman, Assistant Superintendent for Administrative Operations and Staff Relations, whom she considered a "friend." (ER 51) Dr. Goldman told Breeden that if she was lodging a complaint, she should talk to the District's Affirmative Action Officer. He also suggested she could speak with Assistant Superintendent Rice, who was Eldfrick's supervisor. (ER 52, 110)

Breeden did not talk to anyone, until the end of the day, when she went to Eldfrick's office and told him she had been offended by his reading the "Grand Canyon" remark. (ER 54) Breeden claims Eldfrick became "hostile" and said he "didn't mean to offend you" in a "harsh" tone. She claims that, thereafter, Eldfrick was "direct and formal" with her. (ER 54, 214) Breeden then told Dr. Rice about her meeting with Eldfrick. (ER 172) Breeden never

reported the incident to the Affirmative Action Officer. (ER 55)

### The School District's Continued Growth And Reorganizational Efforts

During 1994, Dr. Rice had received complaints about unequal workload distribution in the Human Resources Division, and had developed her own concerns as well. (ER 74-75, 335-336) In December 1994, after several months of review, she concluded that efficiency would be enhanced by consolidating in one administrator certain personnel functions common to all classifications of workers, including processing of FMLA and other leaves and unemployment claims, and coordination with the Risk Management Office on workers compensation claims. (ER 64, 74-75) These functions previously had been distributed among the three subdivisions, with Breeden handling them for Support Staff. (ER 74-75) After considering the workload of each, Dr. Rice removed these duties from the administrators of Licensed Personnel and Substitute Services and assigned them all to Breeden. (ER 74-75, 335-338)

Because Breeden's District-wide responsibilities now were substantially increased, some of her Support Staff recruitment duties were shifted to Eldfrick, who already had to review and sign-off on hiring recommendations. (ER 75, 138) Thus, the paperwork from analysts and assistants now went directly to him, instead of passing through Breeden. (ER 138) Eldfrick also assumed responsibility for the performance evaluations for these analysts and assistants. (ER 138) Breeden remained responsible for certain aspects of processing applicants for school police positions and for approval of advertisements for Support Staff positions. (ER 138)

Two years later, in 1996, there were further realignments within the District, and Dr. Owen Roundy became Breeden's immediate supervisor with responsibility for District-wide FMLA leaves and unemployment claims. (ER 75) In addition, the Professional Development Education Department was transferred from the Elementary Education Division to the Human Resources Division. (ER 134)

With Professional Development responsibilities now in the Human Resources Division and a continually-increasing District work force, Dr. Rice took another look at how to best utilize her staff. She particularly wanted to upgrade Professional Development and offer teachers state-of-the-art continuing education in light of newly issued Nevada state standards. (ER 134) She concluded that an administrator at the Director level should be in charge, but because of budget constraints, could not create a new Director position. (ER 134) She could accomplish her objective, however, by upgrading the administrator position in Professional Development to Director level and utilizing her budgeted administrative specialist position, formerly from Professional Development, elsewhere in the Human Resources Division. (ER 134) She did so and then reassigned Breeden from Director of Support Staff Services to Director of Professional Development. (ER 131-132) Whereas Breeden had previously reported to one of Rice's subordinates, she now reported directly to Dr. Rice. (ER 131-132) Breeden's salary and benefits remained the same. (ER 131-132) She had to change offices because Professional Development was located in a different building several miles away. (ER 111)

At the same time, Dr. Rice reassigned the handling of all unemployment claims back to the Risk Management

Department. (ER 76, 135) At the time, this appeared to be a workable solution because Risk Management was located across the hall from where Human Resources maintained District personnel files. (ER 135) When Risk Management was relocated to another building, claims handling went back to Human Resources because the handling of unemployment claims requires access to personnel files. (ER 135, 139)

**Breeden's Lawsuit**

In the meantime, in August 1995, Breeden filed a complaint with the Nevada Equal Rights Commission ("NERC") and the Equal Employment Opportunity Commission ("EEOC"), alleging that virtually every interaction with Eldfrick and every change in any aspect of her job responsibilities after the October 1994 staff meeting constituted harassment and retaliation for her objection to Eldfrick's reading of the "Grand Canyon" remark. (ER 73) Both the NERC and EEOC found the charges unsupported. (ER 5) Breeden then filed this lawsuit asserting "sexual harassment" and "retaliation" claims under Title VII. 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a).

Following discovery, the District moved for summary judgment. The district court granted the motion as to Breeden's "harassment" claim because the single incident at the staff meeting did not constitute severe or pervasive harassment and thus did not create a "hostile work environment." (App. 15-16) The district court granted the motion as to Breeden's "retaliation" claim on two grounds. First, Breeden could not reasonably have believed she had been subjected to a "hostile work environment," given that Eldfrick had never before made any inappropriate comments and never did afterwards, that he merely had read from the psychologist's report and

that his alleged chuckle was momentary. (App. 17-19) Second, Breeden suffered no "adverse employment action." The district court rejected her argument that her move to Professional Development was an "adverse employment action" because she remained at the same administrative level, had important administrative responsibilities, and now reported directly to the Assistant Superintendent. (App. 20-21)

Breeden appealed only as to her "retaliation" claim. In a two-to-one memorandum opinion (Judges Canby and Reinhardt in the majority, Judge Fernandez dissenting), the Ninth Circuit panel reversed. Observing that the "bar set by the 'reasonable belief' standard used for Title VII retaliation claims in the Ninth Circuit is very low," the panel majority ruled that Breeden reasonably could have believed she had been subjected to "sexual harassment." (App. 34) Applying the Ninth Circuit's newly-articulated definition of "adverse employment action" in *Ray*, 217 F.3d at 1240-43, the panel majority further ruled that Breeden had been subjected to two potentially "adverse employment actions." The majority held that, even though there was no change in Breeden's administrative status and salary and her District-wide responsibilities were enhanced, the reassignment of some of her Support Staff recruiting duties to Eldfrick in December 1994 could be perceived as an "adverse employment action." (App. 4-5) The majority also held that the changes in July 1997 could be perceived as an "adverse employment action" even though Breeden's administrative status and salary again remained the same, she now had District-wide responsibility for upgrading Professional Development and now reported directly to the Assistant Superintendent. (App. 6-7)

Judge Fernandez dissented:

> I respectfully dissent because, as I see it, Breeden has unreasonably built a whole edifice of alleged harassment and retaliation upon the shaky foundation of a single comment at a single meeting. No doubt workplaces are not Panglossian retreats. But this is not the best of all possible worlds, and I doubt that we improve it when we encourage litigation of this ilk. (App. 8)

## REASONS FOR GRANTING THE PETITION

This case squarely presents, on a short and well-defined record, an important issue that has been percolating in the Circuit Courts for the last several years: What is an "adverse employment action" for purposes of a retaliation claim under Title VII? Every Circuit Court, except one, has expressly weighed in on this threshold question. The result is *three* significantly different definitions, with the Ninth Circuit recently staking out, and applying in this case, a position *far* more expansive than either position taken by the other Circuits.

Guidance by this Court is sorely needed. The varying definitions of "adverse employment action" have resulted in a string of irreconcilable outcomes in the Circuits. A record that invariably will lead to summary judgment for the defendant in many Circuits, in the Ninth Circuit almost certainly will go to trial. The Ninth Circuit also has carved out its own liberal standard in determining when "opposition" activity is protected. This conflicting state of the law is frustrating and inexplicable to litigants.

It presents an equally perplexing problem for employees and employers – who need to know, and are entitled to know, what is and is not permissible under

federal workforce legislation like Title VII. This uncertainty is particularly troublesome because of the ever-increasing mobility of our nation's workforce and the increasing national scope of many businesses. As the law currently stands, as employees and employers move among the Circuits, the contours of their rights and obligations under Title VII's anti-retaliation provisions change as well. It is time to restore national uniformity to this important provision of Title VII.

### A. The Circuit Courts Are In Conflict As To What Constitutes An "Adverse Employment Action" For Purposes Of A Title VII Retaliation Claim

#### 1. Retaliation Claims Are The Fastest Growing Category Of Discrimination Complaints; Despite The Need For Uniformity In This Area, There Is A Three-Way Split Among The Circuits

"[R]etaliation claims are the single fastest growing category of discrimination complaint." E.I. Klein & R. Halligan, *A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventive Measures*, 71 N.Y. St. B.J. 51, 51 (1999) (hereinafter Klein & Halligan). "While sex and race discrimination claims still exceed the number of retaliation claims filed in both sectors, retaliation claims have surpassed every other type of discrimination claim, including disability." M. Williams & R. Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, 28 Colorado Lawyer 59, 59 (hereinafter Williams & Rhodes) (1999). The need for uniformity in this area of the law thus has grown acute.

The Circuit Courts agree on the basic elements of a *prima facie* case of retaliation under Section 704(a) of Title

VII. The plaintiff must show that: (1) she or he engaged in activity protected under Section 704(a); (2) the employer took an adverse employment action against her or him; and (3) there was a causal connection between her or his participation in the protected activity and the adverse employment action. *E.g., White v. New Hampshire Dep't of Corrections*, 221 F.3d 254, 262 (1st Cir. 2000); *Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 443 (2d Cir. 1999); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1299 (3d Cir. 1997); *Munday v. Waste Mgmt. of N. Am., Inc.*, 126 F.3d 239, 242 (4th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 705 (5th Cir. 1997); *Yates v. AVCO Corp.*, 819 F.2d 630, 638 (6th Cir. 1987); *Cullom v. Brown*, 209 F.3d 1035, 1040 (7th Cir. 2000); *Williams v. City of Kansas City, Mo.*, 223 F.3d 749, 753 (8th Cir. 2000); *Ray*, 217 F.3d at 1240 (9th Cir.); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857 (10th Cir. 2000); *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1454 (11th Cir. 1998); *Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000).

The Circuit Courts are sharply split, however, on the showing required to establish the second element of a *prima facie* case – an "adverse employment action." *E.g., Ray*, 217 F.3d at 1240 ("The Circuits are currently split as to what constitutes an adverse employment action."); *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 248 n.11 (4th Cir. 2000) ("The Circuits are split as to whether an act of retaliation must be an 'ultimate employment decision' to qualify as an adverse employment action."); *Wideman*, 141 F.3d at 1456 (11th Cir.) ("There is a split on this issue."); Klein & Halligan, at 51 ("what constitutes an adverse retaliatory action can vary widely depending upon the Circuit in which a case is filed"); Williams & Rhodes, at 59 ("a split among the Circuits has developed" as to what constitutes an "adverse employment action").

Indeed, in the wake of the Ninth Circuit's newly articulated definition, there are *three* distinctly different definitions of "adverse employment action."

***"Ultimate Employment Action".*** The Fifth and Eighth Circuits have adopted the narrowest definition of "adverse employment action." These Circuits define the term to mean an "ultimate employment decision," such as hiring, granting leave, discharging, promoting, and compensating. *E.g., Mattern*, 104 F.3d at 707 (5th Cir.) ("our court has stated that 'Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions' ") (quoting *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir. 1995)); *Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850, 854 (8th Cir. 2000) ("A poor performance rating does not in itself constitute an adverse employment action because it has no tangible effect upon the recipient's employment. An unfavorable evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.") [citation omitted]; *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) ("While action complained of may have had a tangential effect on [the plaintiff's] employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII.").

***"Materially Adverse Change In Terms And Conditions Of Employment".*** The Second, Third, Fourth, Sixth, Tenth, and Eleventh Circuits take a somewhat broader view. These Circuits, like the Fifth and Eighth Circuits, equate "adverse employment action" for purposes of a retaliation claim under Section 704(a) with the kind of employment action proscribed by the anti-discrimination

provisions of Section 703, 42 U.S.C. § 2000e-2(a)(1). But these Circuits, unlike the Fifth and Eighth Circuits, more broadly define the kind of employment action proscribed by the anti-discrimination provisions of Section 703.

Thus, in the Second, Third, Fourth, Sixth, Tenth, and Eleventh Circuits an "adverse employment action" must alter the employee's " 'compensation, terms, conditions, or privileges of employment,' or 'adversely affect[ ] his [or her] status as an employee.' " *Robinson*, 120 F.3d at 1300 (3d Cir.) ("Courts have operationalized the principle that retaliatory conduct must be serious and tangible enough to alter an employee's compensation, conditions, or privileges of employment into the doctrinal requirement that the alleged retaliation constitute 'adverse employment action.' "); *accord Richardson*, 180 F.3d at 446 (2d Cir.) ("a plaintiff may suffer an 'adverse employment action' if she endures a 'materially adverse change in the terms and conditions of employment' "); *Munday*, 126 F.3d at 243 (4th Cir.) (no "adverse employment action" where no evidence that "the terms, conditions, or benefits of her employment were adversely affected"); *Yates*, 819 F.2d at 638 (6th Cir.) (transfer and demotion, but with assurance that plaintiff would move into next available upgrade and no change in pay or benefits, was not an "adverse employment action"); *Heno*, 208 F.3d at 857-58 (10th Cir.) (" 'Retaliatory conduct other than discharge or refusal to rehire is. . . . proscribed by Title VII only if it alters the employee's "compensation, terms, conditions, or privileges of employment," or "adversely affects his [or her] status as an employee" ' ") (quoting *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 533 (10th Cir. 1998));[2]

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[2] There is another line of decisions by the Tenth Circuit that eschews a specific definition of "adverse employment action."

*Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 588 (11th Cir. 2000) (complained-of-actions were not "adverse employment actions" because none "were 'objectively serious and tangible enough' to alter [the plaintiff's] 'compensation, terms, conditions, or privileges of employment, deprive . . . her of employment opportunities or adversely affects . . . her status as an employee.' ")

The First and Seventh Circuits have not expressly equated "adverse employment action" for purposes of a retaliation claim under Section 704(a) with the kind of employment actions prohibited by the anti-discrimination provisions of Section 703. The Seventh Circuit has expressly held, however, that an employment action must be "materially adverse" to support a retaliation claim. *E.g., Hill v. American Gen.*, 218 F.3d 639, 645 (7th Cir. 2000) ("An adverse action occurs when an employee is fired or demoted, suffers a decrease in benefits or pay, or is given a significantly lesser job. Not every unwelcome employment action qualifies as an adverse action. Negative reviews, a change in job title, an increased distance to work, or lateral transfer do not, by themselves, qualify."); *Cullom*, 209 F.3d at 1041 (7th Cir.) ("the action 'must be "materially" adverse, meaning more than "a mere inconvenience or an alteration of job responsibilities" ' ") (quoting *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999)). The First Circuit has similarly enumerated actions that are substantially adverse. *E.g., Hernandez-Torres v. Intercontinental Trading*, 158 F.3d 43, 47 (1st Cir.

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*E.g., Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) ("We have not, however, defined a set rule regarding what constitutes an 'adverse employment action.' Instead, we take a case-by-case approach in determining whether a given action is 'adverse.' ") [citation omitted]; *Gunnell v. Utah State Coll.*, 152 F.3d 1253, 1264 (10th Cir. 1998) (same).

1998) ("adverse employment actions" include "demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations").

***"Reasonably Likely To Deter Employees From Engaging In Protected Activity".*** The Ninth Circuit has taken a different approach. In contrast with the overwhelming majority of other Circuits, the Ninth Circuit has expressly held that there is *no* correlation between the kind of employment action proscribed by the anti-discrimination provisions of Section 703 and an "adverse employment action" for purposes of a retaliation claim under Section 704(a). *Ray*, 217 F.2d at 1243 (Section 704(a) does not "prescribe a minimum level of severity"). The Ninth Circuit also has rejected, again in contrast with the overwhelming majority of other Circuits, any threshold level of substantiality, expressly holding in *Ray* and reiterating less than two weeks later in this case, that *any* action can constitute an adverse employment action "if it is reasonably likely to deter employees from engaging in protected activity." *Id.*

While the Ninth Circuit suggested in *Ray* that it was aligning itself with the First, Seventh, Tenth, Eleventh, and D.C. Circuits, 217 F.3d at 1240, that is *not* the case. As discussed above, the Seventh, Tenth, and Eleventh Circuits all require that an action be *materially* adverse. See cases cited, *supra*, at 14-17. Only the D.C. Circuit has suggested that actionable conduct may be defined solely by the plaintiff's perception. But even the D.C. Circuit has not made this an all-encompassing standard. Instead, the D.C. Circuit has said that no complained-of conduct will be automatically excluded, leaving the question to be resolved on a case-by-case basis. *E.g.*, *Cones*, 199 F.3d at 521 (" 'no particular type of personnel action is automatically excluded . . . ' as long as the plaintiff is 'aggrieved'

by the action") (quoting *Brown v. Brody*, 199 F.3d 446, 455 (D.C. Cir. 1999)).

### 2. The Three-Way Split In The Circuits Has Resulted In Irreconcilable Outcomes In Cases Involving Similar Facts

The three-way disagreement between the Circuits as to what constitutes an "adverse employment action" is more than an academic debate. The split is resulting in different outcomes in cases involving similar facts.

This case is illustrative. The Ninth Circuit panel reversed summary judgment for the School District even though Breeden's administrative position remained the same, she continued to have significant administrative responsibilities, and her salary and benefits remained the same. Moreover, the changes in her administrative job that occurred after she complained were entirely consistent with changes that had occurred prior to her complaint as the District struggled to handle explosive growth in its student and staff populations.

The Second, Seventh, Eighth and D.C. Circuits, in contrast, affirmed summary judgments in cases involving comparable facts. *E.g., Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) (applying Title VII principles in ADEA case, transfer from one school to another and change from special education teaching to mainstream assignment did not result in a change of responsibilities "so significant as to constitute a setback to the plaintiff's career"; "the plaintiff must show that the transfer created a 'materially significant disadvantage.' "); *Place v. Abbott Laboratories*, 215 F.3d 803, 810 (7th Cir. 2000) (transfer from an "interesting job" that the plaintiff liked to one she did not like and which lacked supervisory duties and loss of her personal cubicle and

telephone did not constitute adverse employment action); *Spears*, 210 F.3d at 853-54 (8th Cir.) (transfer involving only minor changes in working conditions and no reduction in pay or benefits did not constitute adverse employment action); *Brown*, 199 F.3d at 455-57 (D.C. Cir.) (neither refusal to laterally transfer plaintiff to a position she wanted, nor lateral transfer to a position she did not want, constituted an adverse employment action; plaintiff who has "suffered no diminution in pay or benefits does not suffer an actionable injury unless there are some other materially adverse consequences affecting the terms, conditions or privileges of her employment").

This conflicting state of the law not only is frustrating to litigants, it creates confusion and uncertainty in the day-to-day workplace. As this Court has made clear in its prior cases clarifying the scope and application of federal workplace anti-discrimination statutes, Congress did not intend for there to be a balkanized system of anti-discrimination prohibitions, varying from one Circuit to the next. Rather, Congress enacted these statutory provisions to provide uniform, national standards. *E.g.*, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743 (1998) ("a uniform and predictable standard [for vicarious liability under Title VII] must be established as a matter of federal law").

### 3. The Ninth Circuit's Definition Of "Adverse Employment Action" Effectively Eliminates Any Reasonable Threshold Requirement And Results In Irreconcilable Tension Between Title VII's Anti-Discrimination and Anti-Retaliation Provisions

The Ninth Circuit's eye-of-the-beholder definition of "adverse employment action" means that, in the Ninth

Circuit, unlike any other Circuit, only the barest threshold need be met before a plaintiff pursuing a Title VII retaliation claim can go to trial. While the Ninth Circuit has justified its expansive view as a "liberal" interpretation of the statute, in fact, the Circuit's vacuous definition does not further Congress' intent to enact anti-discrimination statutes that are both salutary and workable. Rather, as Judge Fernandez indicated in his dissent in this case, the Ninth Circuit's approach invites employees to make mountains out of molehills and saddles the federal district courts with routine employment disputes that should be resolved through internal grievance procedures or the state court system.

The Ninth Circuit's approach also is at odds with the approach this Court consistently has taken in interpreting and applying Title VII. For example, when the Court held in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that actionable sex discrimination includes both *quid pro quo* sexual demands and sexual harassment, it established a meaningful threshold for sexual harassment claims. "[A]s the courts in both Rogers and Henson recognized, not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) [citations omitted]).

When the Court further defined the term "hostile work environment" in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), it reaffirmed the threshold required by *Meritor*. While the Court rejected the argument that a plaintiff making a hostile work environment claim must

suffer serious psychological harm, it continued to require that harassment reach a meaningful threshold to be actionable. *Id.* at 21 ("This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.").

In *Burlington*, 524 U.S. at 742, and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), when this Court established standards for an employer's vicarious liability under Title VII, it again reiterated that harassment must be "severe or pervasive" to be actionable. "These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code.' Properly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.' We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment." *Faragher*, 524 U.S. at 788 [citations omitted] (quoting and citing to B. Lindemann & D. Kadue, *Sexual Harassment in Employment Law* 175 (1992) (collecting cases granting summary judgment for the employer)).

Assuming that the severe or pervasive threshold could be met in both *Burlington* and *Faragher*, the Court then drew a bright line between hostile work environment cases in which the employee sustains an adverse tangible employment action and cases in which she or he does not. To implement the statute "sensibly," *Faragher*, 524 U.S. at 805, the Court held that automatic vicarious liability arises only in the first instance, where the employee suffers an adverse tangible employment action. "[W]e think it prudent to import the concept of a tangible employment action for resolution of the vicarious liability

issue we consider here." *Burlington*, 524 U.S. at 761 ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.")

As these cases illustrate, the Court consistently has utilized reasoned thresholds in construing Title VII in clear recognition that Congress did not intend to arbitrate workplace civility or bury the federal courts in minor employment tiffs. The Ninth Circuit's near boundless definition of "adverse employment action," however, invites litigation over every action perceived as a slight.

The Ninth Circuit's sweeping definition also creates within the Circuit a stark lack of congruence between Title VI's anti-discrimination and anti-retaliation provisions. For purposes of a Title VII *discrimination* claim, the Ninth Circuit duly applies the threshold standards that conduct must alter the employee's compensation, terms, conditions, or privileges of employment and that harassment must be severe or pervasive in order to be actionable. Yet, for purposes of a Title VII *retaliation* claim, an inconsequential act – which would not come close to supporting a discrimination claim – will suffice. Thus, in the Ninth Circuit a Title VII retaliation claim is vastly easier to prove than a Title VII discrimination claim.

Why should a victim of alleged discrimination have a greater burden than a victim of alleged retaliation? The Ninth Circuit has not supplied an answer to this odd question. The justification offered by the Ninth Circuit for its approach to retaliation cases is that Title VII's retaliation provision was intended to prohibit action taken with a retaliatory motive. Thus, the state of mind of the perpetrator, not the nature of his or her action, is what is

important. *Ray*, 217 F.3d at 1243. But that analysis could as easily have been applied to Title VII's anti-discrimination provision – *i.e.*, the provision was intended to prohibit discriminatory conduct, therefore, it is the discriminatory intent, not the nature of the conduct, that is important. Yet, that is *not* the approach that has been taken. With good reason. The practical realities of human interaction require that there be some reasoned threshold to insure that the limited resources of the federal courts are devoted to "discrimination" claims that have some colorable legitimacy. *See Williams*, 85 F.3d at 274 (7th Cir.) (absent a threshold, "every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit").

### B. There Also Is Uncertainty As To What Constitutes Reasonable Belief That A Title VII Violation Occurred To Support A Retaliation Claim Under Title VII's "Opposition Clause"

#### 1. Construction Of The "Opposition Clause" Outside The Ninth Circuit

Title VII's "Opposition Clause" provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed ***any practice made an unlawful practice*** by this subchapter. . . . 42 U.S.C. § 2000e-3(a) [emphasis added].

The Circuit Courts uniformly do not read this clause literally to require that an "opposed" practice in fact have violated Title VII. Rather, concerned that a literal reading would chill use of informal means to resolve claims by employees lacking the sophistication to interpret Title VII or predict the law, the Circuits construe Section

2000e-3(a) as requiring a plaintiff to have only an "objectively reasonable" and "good faith" belief that the complained-of conduct violated the anti-discrimination provisions of Title VII. *E.g., Wyatt v. City of Boston*, 35 F.3d 13, 18 (1st Cir. 1994); *Manoharan v. Columbia Coll. of Physicians & Surgeons*, 842 F.2d 590, 592 (2d Cir. 1988); *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989); *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981); *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 751 (6th Cir. 1986); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 358 (8th Cir. 1997); *Zinn v. McKune*, 143 F.3d 1353, 1362 (10th Cir. 1998); *Bigge v. Albertson's, Inc.*, 894 F.2d 1497, 1501 (11th Cir. 1990); *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981).

These Circuits also are consistent in the analysis employed under this "objectively reasonable" standard. They do not seize upon one discrete fact. Rather, the courts scrutinize all of the circumstances surrounding the complained-of conduct and require that the facts as perceived by the plaintiff substantially set forth an actionable discrimination case. There is, in short, a reasoned threshold in these Circuits, and retaliation claims that do not meet this threshold fail. *E.g., Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, 135 (2d Cir.), *cert. denied*, 120 S.Ct. 398 (1999) (protest of co-employees' slurs directed at non-employees not protected); *Manoharan*, 842 F.2d at 593 (2d Cir.) (plaintiff who did not oppose discriminatory conduct but sought to foster affirmative action goals, not covered by Title VII); *Crowley*, 890 F.2d at 687 (4th Cir.) (complaint about co-employee's racial harassment of non-employees not protected); *Byers v. Dallas Morning News*, 209 F.3d 419, 428-29 (5th Cir. 2000) (plaintiff was on notice

of facts demonstrating the complained-of conduct was not discrimination); *Holden*, 793 F.2d at 748-49 (6th Cir.) (plaintiff's attempts to implement affirmative action plan not protected); *Hamner*, 224 F.3d at 705 (7th Cir.) (even though plaintiff concerned about sexual orientation "thought he was opposing an employment practice that violated Title VII . . . his belief must also be objectively reasonable, which means that the complaint must involve discrimination that is prohibited by Title VII"); *Montandon*, 116 F.3d at 359 (8th Cir.) (protest of inappropriate language toward co-workers and plaintiff, and alleged harasser's "three or four seconds" of grabbing his own testicles for reasons plaintiff did not know but that were not based upon sex, not protected under Title VII; "[h]e must, however, have a reasonable belief that his activity was protected by Title VII, and 'cannot avoid scrutiny of his claims' merely by claiming such a belief."); *Evans v. Kansas City, Mo., School Bd.*, 65 F.3d 98 (8th Cir. 1995) (opposition to desegregation practices not protected under Title VII).

### 2. The Ninth Circuit Steadily Has Strayed From The Other Circuits' Application Of The "Objectively Reasonable" Standard

The panel majority itself characterized the Ninth Circuit as having only the barest threshold for determining whether a plaintiff reasonably believes she or he was subjected to conduct that is unlawful under Title VII. (App. 3) And under this most minimal of standards, the panel majority focused solely upon the sexual nature of the "Grand Canyon" remark, disregarding all of the surrounding circumstances and context in which it was uttered – *i.e.*, it was a remark by a job applicant quoted in a psychologist's pre-hire report, it was read at a staff

meeting solely because it raised concerns about the applicant's suitability to be a school police officer, and it precipitated a momentary exchange and a "chuckle." (*Id.*; ER 203-205, 50) Breeden was not, by this brief exchange, even remotely subjected to "disadvantageous terms or conditions of employment" because of her gender. The panel majority's conclusion that Breeden nevertheless had an objectively reasonable belief that she had been subjected to conduct violating Title VII is a marked departure from the analysis undertaken in every other Circuit.

Indeed, the panel majority's approach conflicts with a line of authority within the Ninth Circuit itself. In *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-95 n.5 (9th Cir. 1978), the Ninth Circuit became the first Circuit Court to adopt the "objectively reasonable" standard for "Opposition Clause" cases. In deciding whether that standard was met, the *Sias* Court undertook a comprehensive review of the factual and legal support for the plaintiff's belief that discrimination had occurred. 588 F.2d at 694-695. A number of Ninth Circuit cases have employed this same detailed approach. *E.g., Folkerson v. Circus-Circus*, 107 F.3d 754, 756 (9th Cir. 1997) (protest of customer sexual harassment not protected given the lack of employer control over or acquiescence in customers' actions and of the employer's reasonable steps to prevent such harassment); *Jurado v. Eleven-Fifth Corp.*, 813 F.2d 1406, 1410-12 (9th Cir. 1987) (radio station's English-only rule resulted from market considerations and plaintiff's protest arose from personal concern for his position as a Spanish-speaking radio personality, and not discrimination); *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978) (plaintiff had not protested actions of her *employer*, whose

actions were covered by Title VII, but of a co-worker's use of a racial epithet toward plaintiff's subordinates, conduct outside the Title VII's protections).

Another line of Ninth Circuit cases, however, has departed from the detailed examination of the facts and law required under *Sias* (and in all other Circuits). This line is exemplified by *Trent v. Valley Electric Ass'n., Inc.*, 41 F.3d 524 (9th Cir. 1994), the principal case relied upon by the panel majority here. In *Trent*, an outside consultant hired to give a safety briefing engaged in significant extraneous discussion of sexual topics. The plaintiff, the only female present at the briefing, complained that she had been subjected to "sexual harassment." In concluding that her belief that Title VII had been violated was objectively reasonable, the *Trent* panel focused exclusively upon the sexual nature of the comments by the consultant. *Id.* at 526. Similarly, in *EEOC v. Crown Zellerbach*, 720 F.2d 1008, 1013 (9th Cir. 1983), the panel essentially assumed, without any detailed analysis, that the protested practice was facially discriminatory, and moved on to its chief focus, the form of opposition.

The panel majority's alignment here with *Trent*, and departure from *Sias* and its progeny, is one more step in the Ninth Circuit's drift away from the approach taken by the other Circuits. Indeed, the panel majority's exclusive focus on the sexual-innuendo nature of the "Grand Canyon" comment, rather than the context in which it was read, is all the more astounding in light of the panel majority's conclusion that the momentary exchange about this remark did not come even close to being unlawful "sexual harassment" or any violation of Title VII. (App. 3) Indeed, part of Breeden's job was to read police officer applications and evaluation reports to help screen out

unsuitable candidates including those who harbored discriminatory biases; Eldfrick had never before made any sort of sexual remark; the staff meeting was convened specifically to review the reports of candidates raising special concerns, including the report containing the "Grand Canyon" remark; the remark was *read* from the psychologist's report verbatim and only once; Breeden had already read the report without being "bothered" or communicating any concern about the candidate to Eldfrick. In addition, Breeden undisputedly had within her grasp ample demonstration of the applicable legal standards, in the form of the District's anti-harassment regulation which clearly conveyed that "sexual harassment" involves more than a single remark and requires deferential treatment because of gender. (ER 176-177)

Just how far the panel majority departed from the approach consistently taken in the other Circuits is illustrated by comparing Breeden's case with the facts in *Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). In *Clover*, the plaintiff claimed she was retaliated against for complaints about a vice president's attention to a 17-year-old co-worker. The alleged "harassment" included visits "without any business purpose" to the plaintiff's work area, calls to her personal beeper during work hours, knocks on her door, calling her into the hall to work, hanging up the phone when other employees answered, and "flirting." Upon review of the entire factual context and the applicable law, the Eleventh Circuit held th[illegible]he plaintiff had neither a sexual harassment claim nor a retaliation claim. With respect to the retaliation claim, the Eleventh Circuit reiterated, "we do not mean to hold that the conduct opposed must actually be sexual harassment, but it must be *close enough* to

support an objectively reasonable belief that it is." 156 F.3d at 1351 [emphasis added].

In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), this Court admonished the federal courts that they must take into account the entire factual context to determine whether complained-of conduct has been taken "because of sex" as Title VII requires. *Id.* at 81 (the inquiry "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target"). As Justice Scalia noted, "[t]he real social impact of workplace behavior often depends upon a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.*

This case is a telling example of precisely what this Court, in *Oncale*, confirmed Title VII does not and should not cover. The sexual nature of the single sentence read from the pre-hire report – which was the sole focus of the panel majority's analysis – utterly fails to account for the "constellation of surrounding circumstances." As the dissent pointed out, when the entire cosmos is considered, Breeden could not reasonably have believed she was a victim of "sexual harassment" at the staff meeting.

## CONCLUSION

Petitioner respectfully requests that this Court grant its petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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## Appendix to Petition for a Writ of Certiorari

Ninth Circuit Panel Decision.....App. 1

Order granting summary judgment from District Court .....App. 9

Judgment in the District Court.....App. 23

Ninth Circuit Order denying Petition for Rehearing .....App. 24

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| SHIRLEY BREEDEN,<br>Plaintiff-Appellant,<br>v.<br>CLARK COUNTY SCHOOL DISTRICT,<br>Defendant-Appellee. | No. 99-15522<br>D.C. No. CV-97-0035-DWH<br>MEMORANDUM[1]<br>(Filed Jul. 19, 2000) |

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Argued and Submitted July 10, 2000
San Francisco, California

Before: CANBY, REINHARDT, AND FERNANDEZ, Circuit Judges

Shirley Breeden appeals from the grant of summary judgment on her claim that her employer retaliated against her for complaining about an incident involving a sexually explicit remark made by her supervisor. We hold that a genuine issue of material fact exists as to whether the reorganization of Breeden's job duties in 1994 and her

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

transfer to a different job location in 1997 were retaliatory. We therefore reverse the grant of summary judgment.

The facts are well known to the parties and need not be repeated in detail. We will note only those essential to our decision. The revision of Breeden's job duties in December 1994 occurred before she made a formal complaint in August 1995, and is therefore covered by the opposition clause of Title VII's retaliation provision, while the participation clause applies to the 1997 transfer. 42 U.S.C. § 2000s-3(a). This distinction is pertinent here because under the opposition clause, but not under the participation clause, Breeden is protected from retaliation only if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment. *Trent Valley Elec. Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994). To establish a prima facie case of retaliation under either clause, Breeden must show (1) that she was engaging in a protected activity, (2) that she suffered an adverse employment decision; and (3) that there was a causal link between her activity and the employment decision. *Id.* Once a prima facie case is established, the burden of production shifts to the school district to articulate a legitimate nondiscriminatory reason for each adverse employment action. *Wrighten v. Metro. Hosp. Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984). If the school makes such a showing, the burden shifts back to Breeden to show that the explanation is a pretext, and that a discriminatory reason more likely motivated the employer's action. *Id.*

I.

To succeed in her retaliation claim, Breeden need not prove that her supervisor's conduct was in fact unlawful under Title VII. *Trent*, 41 F.3d at 526. Her informal complaints to Eldfrick and Rice are protected activities under Title VII's opposition clause so long as she can show that she had a reasonable, good faith belief that Eldfrick's conduct was prohibited by Title VII. *Id.* The reasonableness of Breeden's belief must be analyzed under an objective standard which makes allowance "for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims." *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994).

Although the October 21 incident would not support a claim of a hostile work environment, or indeed any other violation of Title VII, we hold that Breeden's belief that the incident constituted unlawful harassment was objectively reasonable. The bar set by the "reasonable belief" standard used for Title VII retaliation claims in the Ninth Circuit is very low. We have previously noted that the directive that Title VII, as remedial legislation, be construed broadly "applies to the reasonableness of a plaintiff's belief that a violation occurred." *Moyo*, 40 F.3d at 985. Although the school district emphasizes that Breeden's complaint was based on a single incident, we have found that an employee reasonably believed Title VII had been violated when sexually offensive remarks were made during a single mandatory meeting. *See Trent*, 41 F.3d at 526. The school district's regulations concerning sexual harassment also would tend to support Breeden's belief. Given that the regulations, which Breeden consulted, state that sexual harassment includes

uninvited sexual teasing, jokes, remarks, and questions, and the general content of Title VII law, it is possible that a reasonable person in Breeden's position could have mistakenly believed that Eldfrick's behavior constituted unlawful sexual harassment.

II.

Breeden alleges that, in retaliation for her complaints, her job duties were revised, and she was stripped of her supervisory responsibilities. An action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity. *Ray v. Henderson*, ___ F.3d ___, No. 99-15289, 2000 WL 897778 at *7(9th Cir., July 7, 2000). We have held that a change in job duties may qualify as an adverse employment decision to support a retaliation claim. *See Passantino v. Johnson & Johnson Consumer Prod. Inc.*, 212 F.3d 493, 506 (9th Cir. 2000); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987); *see also Kortan v. California Youth Authority*, ___ F.3d ___, No. 98-56047, 2000 WL 897751, at *8 (9th Cir., July 7, 2000). Before the incident, Breeden's official job description included "assum[ing] responsibility for the hiring and selection of support staff employees." Breeden supervised and wrote annual performance evaluations for fifteen employees involved in the hiring and selection process. She also processed the leave requests and unemployment claims of district support staff. In December 1994, less than one month after Breeden complained to Rice, Breeden's job duties were revised. She was assigned to process leave and unemployment claims for all district employees. As part of this change, primary responsibility for the recruitment and hiring process, and most of

Breeden's supervisory duties related to this task, were transferred to Eldfrick. While Breeden alleges that this change was an adverse employment decision that reduced the amount of responsibility entrusted to her, the district argues that the change was merely a neutral "reorganization" resulting in the expansion of some of Breeden's duties and the elimination of others. The school district contends that Breeden's position was changed because it was more efficient to have one person responsible for processing leave requests for the entire district, and that her duties and responsibilities involving the recruitment and hiring process were transferred to Eldfrick to provide her sufficient time to perform her new tasks.

Although this is a close case, a genuine issue of material fact exists as to whether the change in Breeden's job duties was an adverse employment action taken in retaliation for her complaints. The school district's assertion that Breeden would not have time to continue her supervisory duties once she assumed responsibility for the district's leave and unemployment claims is subject to dispute in light of the fact that after July 1997 Eldfrick took on this responsibility in addition to his other duties. In addition to the loss of her supervisory duties, the close proximity in time between Breeden's complaint to Rice and the revision of her job duties is sufficient, along with the other evidence discussed herein, to create an inference that her complaint prompted the reorganization. *See Miller v. Fairchild Indus.*, 797 F.2d 727, 730 (9th Cir. 1986). Further, the affidavit of Breeden's secretary that, soon after the change, Eldfrick stated in a staff meeting that

"Breeden may be in the unemployment line . . . " provides circumstantial evidence from which a jury could infer a discriminatory motive behind the 1994 "reorganization."

III.

Breeden also alleges that her transfer to the Professional Development Education (PDE) department in July 1997 was retaliatory. Although the school district argues that the move cannot be an adverse employment action because Breeden's salary and benefits remained the same, we have held that a transfer to another job of the same pay and status may constitute an adverse employment action. *See Ray*, 2000 WL 897778 at *5; *see also McAlindin v. County of San Diego*, 192 F.3d 1226, 1239 (9th Cir. 1999). Breeden's new position was previously held by a Range 38 administrator, three levels below Breeden. She alleges that after the move her duties became largely clerical, her responsibilities were greatly reduced, and her prospects for promotion hampered. The school district contends that the move was a lateral transfer, and that the district determined that an administrator of Breeden's rank was needed at the PDE department due to the growth of the district's student and employee population.

As is the case with respect to the 1994 revision of job duties, the 1997 transfer presents a close question. Again, however, we conclude that Breeden has raised a genuine issue of material fact and has alleged sufficient facts to survive summary judgment. Rice's discussion about transferring Breeden occurred approximately three months after the EEOC's right-to-sue letter was sent to

both parties, and her final decision to reassign Breeden occurred less than one month after she learned of the suit, both of which events are sufficiently proximate in time to raise a genuine issue of fact as to causation. *See Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1997) (holding that four months provides sufficient proximity to establish a causal link). Rice initially justified Breeden's transfer by stating that her leave and unemployment claim duties would be moved out to the Business and Finance Division. However, just one day after Breeden assumed her new position at the Professional Development Education Department, the leave and unemployment claim duties were transferred back to the Human Resources Department and placed under the responsibility of Eldfrick. The school district has not offered any explanation for not transferring Breeden back to the Human Resources Department to resume these duties, and the timing of these events creates a question of fact as to whether the district's explanation for the transfer is pretextual. *See Godwin v. Hunt*, 150 F.3d 1217, 1220-22 (9th Cir. 1998) (holding that an employee may prove pretext to survive summary judgment by showing that the employer's proffered explanation is internally inconsistent or otherwise not believable). The potential inconsistencies in the school district's explanation of her transfer, combined with the fact that Breeden was moved to a position previously occupied by an administrator three levels below her in rank, along with the other evidence we have noted, is sufficient to give rise to a genuine dispute of fact as to whether the transfer was a retaliatory employment action rather than a bona fide lateral transfer.

IV.

For the foregoing reasons, we REVERSE the district court grant of summary judgment and REMAND for further proceedings not inconsistent with this disposition.

*Breeden v. Clark County*, No. 99-15522 [FILED JUL 19 2000]

FERNANDEZ, Circuit Judge, Dissenting.

I respectfully dissent because, as I see it, Breeden has unreasonably built a whole edifice of alleged harassment and retaliation upon the shaky foundation of a single comment at a single meeting. No doubt workplaces are not Panglossian retreats. But this is not the best of all possible worlds, and I doubt that we improve it when we encourage litigation of this ilk.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

| | |
|---|---|
| SHIRLEY A BREEDEN,<br>Plaintiff,<br>v.<br>CLARK COUNTY SCHOOL DISTRICT,<br>Defendant. | CV-S-97-365-DWH(RJJ)<br>**ORDER**<br>(Filed Feb. 9, 1999) |

Before the court is defendant Clark County School District's motion (#27) for summary judgment. Plaintiff has opposed (#30) and defendant has replied (#33). As discussed more fully below, defendant's motion will be granted.

## I. Factual Background

Plaintiff has been employed by defendant Clark County School District since 1984. Complaint ¶ 4. In May 1989, plaintiff became an Administrator in the District's Human Resources Department. Motion (#27), Exh. 2. Her position at that time was Director of Contract Services which subsequently changed to Director of Support Staff Services. Motion (#27), Exhs. 2 & 3 (Plaintiff's Depo.) at 16. During the fall of 1994, plaintiff's job duties included reviewing psychological evaluation reports of school police officer applicants. Motion (#27), Exhs. 3 at 42-43 and 6 (Eldfrick's Aff.) ¶ 4.

On October 21, 1994, plaintiff's supervisor, Don Eldfrick, held a meeting with plaintiff and Jim McIntosh

to discuss reports of psychological evaluations of four District police officer applicants. *Id.* Prior to the meeting plaintiff had reviewed these psychological evaluation reports, including one containing an applicant's response to an inquiry as to whether the applicant had ever told jokes of a sexual nature during employment. Motion (#27), Exh. 3 at 171-72. The report indicated that the applicant admitted making the following sexual remark to a co-worker at a previous job: "making love to you is like making love to the Grand Canyon." Motion (#27), Exh. 6 ¶ 5. Plaintiff testified that when she read this remark in the report prior to the meeting she was surprised but it did not upset her or bother her. Motion (#27), Exh. 3 at 171-72. According to plaintiff, Eldfrick read aloud the remark from the report during the meeting and then he looked at plaintiff and stated, as he shrugged his shoulders, "I don't know what that means." Then, McIntosh stated "Well, I'll tell you later" and they both laughed. Opp. (#30), Exh. 4 (Plaintiff's Depo., Vol. 2) at 88-96. Plaintiff testified that she was embarrassed and offended by Eldfrick's conduct at the meeting. *Id.* at 92, 95.

That afternoon, plaintiff went to see her friend, Assistant Superintendent Ed Goldman, to complain about Eldfrick's conduct at the meeting. *Id.* at 105-06. Goldman told plaintiff that she had three choices: file a sexual harassment complaint with the District's affirmative action officer, talk directly to Eldfrick, or do nothing. *Id.* at 119-20. Later in the day, plaintiff confronted Eldfrick and told him that his decision to read the sexual remark from the application during the meeting had offended her. *Id.* at 125-28. Plaintiff testified that, on the following

Monday, Eldfrick's attitude and conduct towards her changed and he began addressing her in a hostile tone. *Id.* at 131-32. After two weeks, plaintiff complained to Eldfrick's supervisor, Assistant Superintendent George Ann Rice, about the October 21, 1994 meeting and Eldfrick's subsequent behavior towards plaintiff. Opp. (#30), Exh. 7 (Plaintiff's Depo., Vol 5) at 42. Plaintiff testified that in response to her complaint, Rice asked plaintiff, "What are you going to do to bring harmony back into the department?" *Id.* at 43.

In December 1994, as part of a reorganization of the Human Resources Department, Rice revised plaintiff's job duties, increasing her responsibilities in some areas such as in handling Family and Medical Leave Act requests, unemployment claims, and worker's compensation claims, and reducing her responsibilities in other areas. Motion (#27), Exhs. 7 and 10 (Rice's Aff.) ¶¶ 3-8. Plaintiff claims that Rice changed plaintiff's job duties in retaliation for plaintiff's complaints concerning Eldfrick's conduct.

On March 30, 1995, plaintiff submitted a general intake form with Nevada Equal Rights Commission (NERC). Motion (#27), Exh. 8. On August 23, 1995, plaintiff filed a formal charge against defendant with NERC. Motion (#27), Exh. 9. In November 1996, Owen Roundy replaced Eldfrick as plaintiff's supervisor as part of a reorganization of the Human Resources Department by Rice. Motion (#27), Exh. 10 ¶ 9. On April 1, 1997, plaintiff filed this action against defendant. On April 10, 1997 Rice mentioned to Allin Chandler, Executive Director of plaintiff's union, that she was contemplating transferring

plaintiff to the position of Director of Professional Development Education. Reply (#33), Exh. E (Rice's Aff.) ¶ 5. On April 11, 1997, plaintiff served defendant with the summons and complaint. In her affidavit, Rice states that she did not have knowledge of the filing of plaintiff's compliant until sometime after April 11, 1997. *Id.* ¶ 4. In May 1997, plaintiff received word that in July 1997 she would be transferred to the position of Director of Professional Development Education within the Human Resources Department. Plaintiff claims that she was transferred in retaliation for filing this lawsuit on April 1, 1997.

## II. Analysis

### A. Summary Judgment Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, *Zoslaw v. MCA Distr. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Baker v. Centennial Ins. Co.*, 970 F.2d 660, 662 (9th Cir. 1992). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve

the differing versions of the truth. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

> [T]here is no genuine issue of fact for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

*Id.* at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). Moreover, if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

### B. Plaintiff's Hostile Work Environment Claim

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). A plaintiff may show a violation of Title VII "by proving disparate treatment or disparate impact, or by proving the existence of a hostile work environment." *Sischo-Nownejad v. Merced Community College Dist.*, 934 F.2d 1104, 1109 (9th Cir. 1991). A hostile work environment is shown by "the existence of severe or pervasive and unwelcome verbal or physical harassment because of the plaintiff's membership in a protected class." *Id.* (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66-67 (1986)). The conduct must be sufficiently severe and pervasive to alter the conditions of the plaintiff's employment and create an abusive working environment. *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). In addition, the work environment must both subjectively and objectively be perceived as abusive. *Id.*

Whether the conduct was sufficiently pervasive to create a hostile work environment is determined by the totality of the circumstances. *Harris v. Forklift Systems, Inc.*, 510 U.S 17, 23 (1993). The factors that a court may consider include: (1) the frequency of the conduct; (2) its severity; (3) whether it is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance. *Id.* All factors may be taken into account but no single factor is required. *Id.* In addition, courts have held that the mere utterance of an epithet which engenders offensive feelings in an employee, *Id.* at 21, or isolated incidents of sexual horseplay over a period of years do not amount to a hostile work environment. *Candelore v.*

*Clark County Sanitation District*, 975 F.2d 588, 590 (9th Cir. 1992).

Here, the single incident at the October 21, 1994 meeting was not sufficiently severe or pervasive to create a hostile work environment. Even if plaintiff subjectively perceived Eldfrick's conduct as offensive, the incident was isolated, there was no other allegation of inappropriate sexual conduct by Eldfrick or others, and taken in the context, the incident was not objectively offensive or abusive. It was part of both plaintiff's job and Eldfrick's job to review the psychological reports of police officer applicants and to discuss them together. The reports necessarily included information about racial jokes or sexual comments that applicants admitted making to co-workers in previous jobs. Apparently, this information was used in the hiring process to lessen the risk of lawsuits of the type that plaintiff has filed here. Plaintiff read the sexual comment from the psychological report prior to the October 21, 1994 meeting and has conceded that it did not bother or upset her at that time. Plaintiff could not have been reasonably surprised or offended when the comment was brought up and read by Eldfrick during the meeting. Even plaintiff's other allegations that that Eldfrick also remarked, while looking at plaintiff and shrugging his shoulders, that he did not know what the sexual comment meant and laughed at McIntosh's response that "I'll tell you later" falls short of objectively offensive or abusive conduct.

The weakness of plaintiff's hostile work environment claim appears to have been conceded by plaintiff who failed to oppose the portion of defendant's summary judgment motion addressing this claim. Accordingly,

defendant is entitled to summary judgment on plaintiff's hostile work environment claim.

### C. Plaintiff's Retaliation Claim

Section 2000e-3(a) makes it unlawful for an employer "to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice" by Title VII "or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under" Title VII. 42 U.S.C. § 2000e-3(a). The first clause is known as the "opposition clause" and the second clause is known as the "participation clause." To establish a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in activity protected by Title VII; (2) she suffered an adverse employment decision; and (3) a causal connection existed between her activity and the adverse employment decision. *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 (9th Cir. 1989). If the plaintiff makes a prima facie case, the burden shifts to the employer to articulate some legitimate, nonretaliatory reason for the adverse action. See *Wrigthen v. Metropolitan Hosp., Inc.*, 726 F.2d 1346, 1354 (9th Cir. 1984). If the employer makes such a showing, the burden shifts back to the employee to show that the explanation is a pretext or that the discriminatory reason more likely motivated the employer's action. *Id.*

The court's finding that defendant is entitled to summary judgment on plaintiff's hostile work environment claim does not bar plaintiff's Title VII retaliation claim. Plaintiff is not required to prevail on her underlying

claim of discrimination in order to pursue her Title VII retaliation claim. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

**1. Protected Activity**

Plaintiff argues that she engaged in protected activities under Title VII when she complained about Eldfrick's conduct to Goldman, Eldfrick, and Rice in October and November 1994, when she filed her charge of discrimination on August 23, 1995, and when she filed this lawsuit on April 1, 1997. Defendant does not dispute plaintiff's claim that filing a charge of discrimination with NERC or filing a Title VII lawsuit are activities protected by Title VII's participation clause. However, defendant contends that plaintiff's complaints to Goldman, Eldfrick, Rice in October and November 1994 do not qualify as protected activities under Title VII's opposition clause because plaintiff's belief that Eldfrick's conduct violated Title VII was not objectively reasonable. Thus, defendant argues that any allegedly retaliatory conduct occurring prior to the filing of the NERC discrimination charge in August 1995, such as Rice's revision of Plaintiff's job duties in December 1994, cannot be used by plaintiff to support a retaliation claim.

When an employee protests the actions of a supervisor, such opposition is a protected activity under Title VII's opposition clause so long as the employee can show she had a reasonable, good faith belief that the supervisor's conduct was prohibited under Title VII. *Trent v. Valley Electric Ass'n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994); see also *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008,

1013 (9th Cir. 1983) ("opposition clause protection will be accorded whenever the opposition is based on a 'reasonable belief' that the employer has engaged in an unlawful employment practice"). The reasonableness of the employee's belief is analyzed under an objective standard which makes allowance "for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims." *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994).

Although the evidence indicates that plaintiff had a good faith belief that she was subjected to unlawful sexual discrimination in the form of a hostile work environment, such a belief was not objectively reasonable in the circumstances. Prior to the October 21, 1994 meeting, plaintiff had a good working relationship with Eldfrick. Motion (#27), Exh. 3 at 124. During the two and a half years that they had worked together, plaintiff had never heard Eldfrick make any sexual comments and had never experienced any "negative" incidents with Eldfrick. *Id.* at 99, 108. The sexual comment that Eldfrick repeated at the October 21, 1994 meeting came directly from a report that plaintiff was expected to read as part of her job, and which she did read prior to the meeting. As an administrator in the Human Resources Department whose job duties included reviewing psychological reports of job applicants which might contain evidence of past discrimination or harassment by the applicants, plaintiff must expect to be exposed to and must be able to engage in open discussions concerning sexual comments such as the one at issue here. In this context, it is simply unreasonable for plaintiff to believe that Eldfrick's conduct in reading the comment at the meeting was unlawful under

Title VII. Moreover, even if Eldfrick's repetition of the comment together with his follow-up remark ("I don't know what that means") and his subsequent laughter with the other male employee in the meeting could be considered offensive or harassing, it was a single, isolated, and somewhat ambiguous incident. No reasonable person in plaintiff's position could believe that this incident alone created a hostile work environment in violation of Title VII. Cf. *Trent*, 41 F.3d at 525, 527 (evidence supported finding of reasonable belief that it was unlawful for plaintiff, who was attending a safety seminar as required by her employer, to be subjected to a series of sexually offensive references, including a description of the sexual experiences of linemen at a Nevada brothel, which were completely unrelated to the topic or purpose of the seminar); *Rasmusson v. Copeland Lumber Yards, Inc.*, 988 F.Supp. 1294, 1304 (D.Nev. 1997) (plaintiff had a reasonable belief that his supervisor's conduct constituted unlawful sexual discrimination where plaintiff was the subject of several comments of a sexual nature, as well as two incidents involving physical contact). Thus, plaintiff did not engage in a protected activity under Title VII until August 23, 1995 when she filed a discrimination charge with NERC.

**2. Adverse Employment Action**

Because plaintiff's protected activities only began in August 23, 1995, the court will not consider any alleged adverse employment decisions occurring prior to that date. The only alleged adverse employment decision affecting plaintiff after August 23, 1995 was her transfer to the position of Director of Professional Development

Education ("PDE") at the District's North Ninth office in July 1997. However, plaintiff is unable to show that a lateral transfer to another position in the Human Resources Department, involving no change in salary, eligibility for raises, benefits, or ability to advance one's career, was "adverse" employment decision. See, e.g., *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1996) (declining to view transfer to new department as an adverse employment action); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 n. 6 (9th Cir. 1994) (questioning whether transfer from swing shift to day shift was "adverse" employment action where employee "was not demoted, or put in a worse job, or given any additional responsibilities"); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (finding that a purely lateral transfer, which does not involve a demotion in form or substance and results in no reduction in pay and no more than a minor change in working conditions, cannot rise to the level of a materially adverse employment action).

Although plaintiff correctly points out that the PDE position was formerly occupied by an administrator three levels below plaintiff's range, the PDE position was upgraded to plaintiff's range prior to plaintiff's transfer instead of plaintiff's range getting downgraded to fit the position. This position was upgraded by Rice who felt that such a change was warranted to reflect the increased responsibilities of the PDE department in fulfilling the continuing education needs of teachers in a District experiencing phenomenal growth in both the numbers of students and teachers. See Reply (#33), Exh. E (Rice Aff.) ¶ 6.

Plaintiff also argues that the transfer was adverse because it involved moving her office from the District's

main building several miles away to a trailer at the District's North Ninth location, which plaintiff claims is also known as "Siberia" or "the graveyard for employees who have fallen out of favor." See Opp. (#30) at 4, 8. Plaintiff offers no support for her claim that the District's North Ninth office is perceived as "Siberia" or a graveyard for disfavored employees. In contrast, defendant demonstrates that many of the District's important administrative functions are carried out in the North Ninth location and that several administrators with higher ranks than plaintiff maintain their offices in trailers at that location. See Reply (#33), Exh. A (Goldman Aff.) ¶¶ 5-6. Moreover, to the extent, plaintiff experienced a loss of prestige or status by being transferred to a position at an allegedly inferior location and which used to be performed by a lower-level administrative employee, this loss of prestige or status does not establish an adverse employment action. See *Flaherty v. Gas Research Institute*, 31 F.3d 451, 457 (7th Cir. 1994) ("plaintiff's perception that a lateral transfer would be personally humiliating is insufficient, absent other evidence, to establish a materially adverse employment action"). Accordingly, plaintiff has failed to establish the second element in her prima facie case for retaliation.

### 3. Causal Connection

Even assuming, *arguendo*, that plaintiff was able to demonstrate that she suffered an adverse employment decision, she has not shown that any causal connection exists between her protected activities and the adverse employment decision. To prove this third element, plaintiff relies wholly on the temporal proximity of the filing

of her complaint on April 1, 1997 and Rice's statement to plaintiff's union representative on April 10, 1997 that she was considering transferring plaintiff to the PDE position. However, defendant has offered Rice's affidavit in which she states that she did not receive notice of the filing of plaintiff's suit until after April 11, 1997, the date that plaintiff's complaint was served on the District. Reply (#33), Exh. E (Rice's Aff.) ¶ 5. This testimony undercuts any link between plaintiff's protected activity and the allegedly retaliatory decision to transfer plaintiff. Moreover, the fact that plaintiff initially filed her charge of discrimination with NERC in August 1995 and apparently remained at her position without any problems until the decision to transfer her was made over a year and a half later suggest that plaintiff's transfer was unrelated to her legal action against the District.

Thus, plaintiff has not established a prima facie case of retaliation under Title VII and defendant is entitled to summary judgment on that claim.

## III. Conclusion

Accordingly, **IT IS ORDERED** that defendant's motion (#27) for summary judgment be GRANTED.

Let judgment be so entered.

DATED: This 8th day of February, 1999.

/s/ David W. Hagen
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

SHIRLEY A BREEDEN,

Plaintiff(s),

V.

CLARK COUNTY SCHOOL DISTRICT,

Defendant(s),

JUDGMENT IN A CIVIL CASE

(Filed Feb. 10, 1999)

CV-S-97-0365 DWH (RJJ)

___ **Jury Verdict.** This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X **Decision by Court.** This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

Motion for summary judgment on behalf of the defendant granted. Summary judgment granted in favor of defendant and against plaintiff.

February 10, 1999
Date

LANCE S. WILSON
Clerk

/s/ Faye B. Jones
(By) Deputy Clerk,

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| SHIRLEY BREEDEN,<br>Appellant,<br>v.<br>CLARK COUNTY SCHOOL DISTRICT,<br>Appellee. | No. 99-15522<br>D.C. No. CV-97-0035-DWH<br>(Filed Aug. 31, 2000) |

Before: CANBY, REINHARDT, AND FERNANDEZ, Circuit Judges

The panel has voted to deny Appellee's Petition for Rehearing with Petition for Rehearing En banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing with petition for rehearing en banc is denied.

Supreme Court, U.S.
FILED
FEB 28 2001

No. 00-866

In The

# Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT,

*Petitioner,*

v.

SHIRLEY A. BREEDEN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a reorganization which removes an employee's supervisory responsibilities, her primary job duties, places her in a new position which was previously held by a lesser ranked individual, in a remote location away from the employer's main office, can constitute an "adverse employment action?"

2. Whether the "reasonable belief" standard is met where the employee is subject to improper sexual banter and two weeks of abusive behavior?

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

## STATEMENT OF THE CASE

Shirley Breeden ("Breeden") is a long time employee of the Clark County School District ("School District"). From her start as an entry level, support staff employee right out of high school, Breeden has risen through the ranks to become a high level administrator. In 1990 Breeden was promoted to the job of Director of Support Staff Services, Job Range 41, pursuant to appointment by the Board of School Trustees.

### Breeden's Job Duties

According to her performance evaluation, Breeden's primary duties as the Director of Support Staff Services were:

1. Supervise twelve staff members.

2. Provide direction to the Recruitment Specialist regarding the advertisement of all secretarial/clerical positions.

3. Supervise applicant processing including distribution of applications, intake, interviews, screening, and filing applications.

4. Ensure that appropriate references and background investigative reports were obtained.

5. Work with payroll section regarding appropriate pay for all secretarial/clerical employees.

6. Respond to district administrators regarding personnel needs/concerns.

7. Respond to employee/applicant concerns as it relates to employment, transfers, promotion, leaves-of-absence, retirement, and resignation. ER 84.

In short, Breeden was responsible for supervising the employees who were responsible for screening and hiring the School District's 5,000 non-licensed employees, including school police. Breeden and her staff did background checks, reviewed FBI reports, handled leave requests, unemployment claims, and helped place injured workers back to work. As reflected on her annual evaluations, from 1990 to 1994 Breeden received numerous additional job responsibilities and assignments, but *none of her existing job responsibilities were ever taken from her.* ER 64, 70, 86, 88, 172.

As of October, 1994, Breeden was 38 years old and earning $65,000 per year. ER 70. The number of employees Breeden supervised had increased to 15. Breeden's supervisor was Personnel Manager Don Eldfrick. There were rumors that Eldfrick was moved to this position because "he got in trouble with a female teacher." ER 228. When one of Breeden's female employees, Debbie Devro, complained about Eldfrick to the School District's affirmative action officer, Eldfrick told Breeden that "no one who filed harassment charges on him would get away with it." ER 210. Eldfrick admits to having an affair with his secretary, Martha Camman, during this same time period. ER 394.

**Breeden's First "Oppositional Activity"**

On Friday, October 21, 1994, Breeden attended a meeting to discuss applicants for police officer positions in which she, one of her subordinates, Jim McIntosh, and her direct supervisor, Don Eldfrick, were present. During the meeting Breeden was offended, embarrassed and humiliated by the following exchange between her male supervisor and her male subordinate:

> Don read the comment that the candidate had told the doctor, "I hear making love to you is like making love to the Grand Canyon" and Don looked at me and said, as he shrugged his shoulder, "I don't know what that means," and then Jim said, "Well, I'll tell you later." And they both started laughing. ER 87-88.

Breeden felt Eldfrick knew what the comment meant and intended to make her uncomfortable by shrugging his shoulders, looking straight at her, and facetiously and unnecessarily asking her what it meant. ER 212. Breeden was further offended and embarrassed when Eldfrick approved of McIntosh's unprofessional response and proceeded to enjoy a laugh with, and in front of, her subordinate. ER 204-05.

After she left the meeting Breeden could not stop thinking about Eldfrick's sexist behavior. Later that same day, Breeden complained about Eldfrick's unprofessional conduct to Associate Superintendent Ed Goldman. Dr. Goldman advised Breeden she had three choices – she could file a sexual harassment complaint with the affirmative action officer, she could do nothing, or she could speak directly to Eldfrick. ER 211.

Although she was afraid Eldfrick would retaliate against her based upon his previous statement to her that "no one who filed harassment charges on him would get away with it," Breeden confronted him regarding his embarrassing and offensive behavior at the close of that same business day. ER 210, 213. "I wanted to let him know that I was offended, so it would, we could just resolve it." ER 212.

Despite the fact that Breeden started crying, Eldfrick responded to Breeden's concern with a scowl and a harsh tone. ER 213-14. Eldfrick made no attempt to resolve the situation, apologize or explain his conduct. ER 213-214. The meeting quickly ended and Breeden walked out of Eldfrick's office. ER 213.

After Breeden complained, Eldfrick's attitude toward Breeden changed dramatically. Starting that next Monday, Eldfrick became unfriendly and nasty toward Breeden, he stared at her, and the tone of his voice was harsh and edgy. ER 214, 258, 260. He communicated to her primarily through notes. ER 304. Breeden's secretary also noticed that Eldfrick treated Breeden differently. According to Carolyn Ann Givens:

> [Eldfrick] was curt with her at times. He gave her a lot of work, added responsibility, made comments, different types of comments that I felt were just kind of badgering kind of things. ER 415.

Also after Breeden complained, Breeden's secretary recalls Eldfrick making a comment at a staff meeting, stating that "Breeden may be in the unemployment line . . . " ER 415-16.

In the meantime, Goldman contacted Eldfrick's supervisor, George Ann Rice, and recounted his conversation with Breeden. Of substance, Goldman told Rice two very significant pieces of information. Number one, Goldman told Rice that Breeden had a concern about "sexual harassment." Number two, Goldman informed Rice that he advised Breeden to speak with the School District's affirmative action officer, Tom Rodriguez. ER 334. After hearing from Goldman, Rice took Eldfrick to meet with Rodriguez. ER 369. Thus it was Goldman, not Breeden, who identified the problem as "sexual harassment" and who led to the involvement of the School District's affirmative action officer.

Meanwhile, Breeden was enduring Eldfrick's negative treatment of her. After two weeks of such treatment, Breeden complained to Goldman again, who urged her to complain to Rice. After telling Rice "what had happened," Rice asked Breeden why she had not come to her and told her first, instead of going to Goldman. ER 306. Rice responded by immediately blaming Breeden for the situation. Rice asked her, "Well, what are you going to do?" Breeden stated, "Well, what do you mean, what am I going to do?" Rice explained, "What are you going to do to bring harmony back in the department?" ER 306. Rice obviously blamed Breeden for creating "disharmony" in the department by complaining about Eldfrick.

**Breeden's First Tangible Employment Action**

Approximately one month after Breeden complained to Rice, she was called into a meeting with Rice and Eldfrick. ER 335-40, 369-70. In this meeting, Breeden was

advised that although her title would remain the same, her entire job was being changed. Breeden's responsibility for overseeing the recruitment, hiring and firing of the School District's 5,000 support staff employees, including the 15 employees who were under her immediate supervision, was taken away from her. Instead, Breeden would only handle unemployment and Family Medical Leave claims for support staff and licensed personnel. Despite the School District's creative attempt to put a positive spin on this change, it was obviously a substantial reassignment leaving Breeden with substantially less supervisory responsibility. Also, this was the first time Breeden's existing job duties had been changed, and there is no documentary evidence supporting the School District's assertion that this reorganization had been planned for several months.

Breeden was the only individual adversely affected by this "reorganization." Three of Breeden's comparable co-workers, Shirley Sandoval, Audrey Larsh, and Barbara Thornton, would continue to supervise numerous employees and perform their primary job duties. ER 173. In her new position Breeden spent appoximately 90% of her time handling FMLA matters. ER 276. Significantly, when Breeden was later transferred to Professional Development, her FMLA duties were assigned to a newly hired personnel analyst, Stephanie Landeros. Obviously the FMLA duties were below Breeden's skill level if they could be performed by a personnel analyst. ER 390, 391.

**Breeden's Second "Oppositional Activity"**

After Eldfrick's negative treatment of her, and her radical change in job duties, Breeden filed an Intake form with the Nevada Equal Rights Commission in March, 1995, alleging retaliation, sexual harassment and harassment. ER 70. The information on that form led to Breeden's Charge of Discrimination for sex discrimination and retaliation which was filed with the EEOC August 23, 1995. ER 73.

According to that Charge, Breeden alleged she was "being discriminated and retaliated against because of her sex, female." Breeden's Charge goes on to state that she "protested the articulation of a sexual innuendo" and has been "exposed to a hostile work environment and retaliation through harassment" since that time. This lawsuit, based upon that Charge, was filed on April 1, 1997. The lawsuit does not mention sexual harassment. ER 34.

**Breeden's Second Tangible Employment Action**

Ten days after Breeden filed her lawsuit, on April 10, 1997, Rice met with the Executive Director of Breeden's union and informed him that she was contemplating transferring Breeden to a newly created position, Director of Professional Development. This position, which was located in a trailer at the District's "North Ninth" office several miles away from the central office where Breeden previously worked, was being currently performed by an Administrative Specialist (Range 38), Donna Mahler. ER 134, 172, 408-10.

Rice carried through on her contemplation. In May, 1997, Rice informed Breeden of her transfer to "Siberia," as the North Ninth location was known. Rice explained the transfer was necessary because Breeden's unemployment and workman's compensation duties were being assigned to the Business Division. ER 172. However, as soon as Breeden assumed her new position, the unemployment and workman's compensation duties were reassigned to Eldfrick's department and a new personnel analyst position was created to handle FMLA leave. ER 172-73. Ironically, by removing Breeden from the support staff office Rice was able to increase the titles and salaries of her existing staff, including Eldfrick who received a promotion to Executive Director at a cost of $4,949.00. ER 82.

Breeden's new office was in a portable trailer several miles from the School District's main office, Breeden's previous work location. Instead of having her own private office, Breeden now had a cubicle. Instead of routinely interacting with District Administrators and School Board trustees, Breeden rarely saw them. Her position is largely clerical and represents a significant demotion in responsibility from her previous assignments. ER 172-74. Thus, three years after she dared to complain that Eldfrick had acted unprofessionally and was treating her with hostility because of her sex, Breeden found herself working in a trailer performing clerical tasks, while Eldfrick ended up with a new title and a significantly increased salary, still working at the main office. Coincidence? Breeden doesn't think so.

At the conclusion of discovery the School District filed a motion for summary judgment. Consistent with

her Charge of Discrimination and Complaint, Breeden did not oppose the motion with respect to the School District's assertion that she could not state a viable hostile environment sexual harassment claim. ER 162.

In summary, contrary to the School District's assertion, Breeden's case is not based solely upon an innocent comment that her supervisor was required to read. Breeden's first allegation of retaliation is based upon her complaints regarding the October 21, 1994 meeting *and* Eldfrick's adverse treatment during the two week period which ended with her complaint to Rice. Breeden alleges those complaints led to the significant change in her job duties which occurred on December 12, 1994, one month later.

Breeden's second allegation of retaliation is based upon her filing this lawsuit, an act which is absolutely protected under Title VII, and her subsequent reassignment to be the Director of Professional Development based out of a trailer several miles removed from the School District's main building. There is no question that Breeden is protected with respect to this action, so if this Court believes this transfer constituted an "adverse employment action," Breeden's lawsuit must go forward.

## REASONS FOR DENYING THE PETITION

Contrary to the School District's representation, this case does not squarely present, on a short and well-defined record, the issue of what is an "adverse employment action." This Court has previously acknowledged

that a "reassignment with significantly different responsibilities" may constitute a "tangible employment action." *Burlington v. Ellerth*, 524 U.S. 742, 761 (1998) (emphasis added). Based upon this holding, if Breeden can demonstrate that she experienced a major reassignment this Court does not need to consider the School District's argument that the Circuits are split as to the issue of what constitutes adverse action.

As Breeden has summarized above, there are at least, for summary judgment purposes, two instances where Breeden was given significantly different responsibilities which would constitute adverse employment actions. Thus the question which the School District seeks to have this Court decide is in reality not a viable issue in Breeden's case.

## A. Breeden Experienced Two Adverse Employment Actions

### 1. Breeden's Undesirable Reassignments in 1994 and 1997 Qualify as Tangible Employment Actions Previously Recognized by this Court

The School District seeks to have its petition for certiorari granted by asserting that Breeden's case is similar to *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000), thus inferring that by ruling on Breeden's case this Court can effectively rule on the holding in *Ray*. However, the facts in Breeden's case are far different from those in *Ray*, and thus it would be improper to use Breeden's case to overturn the holding in *Ray*.

In *Ray* the plaintiff alleged he was retaliated against when the post office eliminated an employee complaint

program, a flexible start-time policy, lockdown procedures, and reduced workload. Although the reduced workload caused a reduction in Ray's pay, the other actions would not constitute a "reassignment with significantly different responsibilities." Thus the Ninth Circuit's decision to uphold Ray's assertion that he had suffered an adverse employment action was necessarily based upon a finding that an act falling short of a significant reassignment would qualify.

In contrast, in Breeden's case in both 1994 and 1997 she encountered "reassignments with significant different responsibilities." In 1994, prior to her complaints, Breeden was the Director of Support Staff, supervising 15 employees who were in turn responsible for managing the employment policies which covered all non-licensed School District employees. After her complaints, Breeden's supervisory duties were given to Eldfrick, the individual she complained about, while Breeden was relegated to handling FMLA applications and assisting injured employees who were released to return to work to find jobs. Breeden testified that 90% of her time was taken up handling the FMLA duties, which were assigned to a clerical person when she was subsequently transferred. Obviously, at least for purposes of summary judgment, this was a significant change in her job duties.

In 1997, shortly after she filed this lawsuit, Breeden again experienced a significant change in her job duties. At that time Breeden's position was eliminated and she was transferred to a new position, Director of Professional Development, which handled continuing education for licensed staff from a trailer located several miles away from her previous office in the School District's main

facitility. The individual who held this position prior to Breeden, Donna Mahler, was a Range 38 Administrative Specialist, three levels below Breeden. For purposes of summary judgment, this change was significantly different and thus constituted a tangible employment action.

Ironically, as a result of the reorganization which placed Breeden in the Professional Development office also resulted in a significantly different change in Eldfrick's position – he was given a new title and a $5,000 per year pay raise, even though he was not given any additional responsibilities. ER 82.

### 2. The Ninth Circuit's Approach to Adverse Treatment is Consistent With Other Circuits and EEOC Guidelines

Under 42 U.S.C. § 2000e-3(a), it is unlawful "for an employer to discriminate" against an employee in retaliation for engaging in protected activity. Presumably in choosing the term "discriminate" Congress intended to include acts which would qualify as discriminatory conduct under other sections of the Act, and did not intend to limit retaliation claims to instances where only a termination or demotion are involved. As the D.C. Circuit has held, "The Statute itself proscribes 'discrimina[tion]' against those who invoke the Act's protections; the statute does not limit its reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion." *Passer v. American Chemical Soc.*, 935 F.2d 322, 331 (1991).

Breeden does not dispute the School District's claim that the Circuits are split on the definition of "adverse

employment action." The Ninth Circuit, along with the First, Seventh, Tenth, Eleventh and D.C. Circuits, have articulated similar opinions as to what may constitute an adverse employment action. These definitions are consistent with the EEOC's position as articulated in the EEOC's Compliance Manual on Retaliation. *Ray*, 217 F.3d at 1241-42.

According to the EEOC, an "adverse employment action" can be "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual Section 8, "Retaliation" Par. 8008 (1998). As this Court has previously acknowledged, EEOC Guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

The EEOC's test focuses on the deterrent effects of an employment action instead of focusing on the ultimate effects. *Ray*, 217 F.3d at 1243. In doing so it is consistent with this Court's recent holdings which encourage employers to implement sexual harassment policies and penalize employees who fail to utilize those policies. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) ("If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.")

If it is important to encourage employees to utilize an employer's internal grievance procedures, it is equally important to assure employees that they will be protected

if they do so. What will co-workers learn if they see an employee complain about her supervisor, and then one month later have her job duties totally restructured and her subordinates taken from her and given to her harasser? It does not take a rocket scientist to know the message that was sent when Breeden was stripped of her supervisory responsibilities in December, 1994, and then again in July, 1997, when she was placed in a lesser position far removed from the School District's main office. If these employment actions do not qualify as retaliatory conduct, then Breeden's co-workers and subordinates will clearly understand the School District's anti-retaliation policy – complain at your own risk.

**B. Breeden Reasonably Believed She Was Complaining About Illegal Conduct**

**1. Breeden Engaged in Protected Activity When She Complained About Eldfrick's Comments and Conduct and When She Filed This Lawsuit**

In an attempt to obtain this Court's attention, the School District has focused solely upon Breeden's first protected activity, asserting it was not based upon a reasonable belief. This argument conveniently ignores Breeden's second protected activity – the filing of this lawsuit. There is no reasonable belief requirement for retaliation which results from "participation" in Title VII proceedings, so whether Breeden had a reasonable belief is not dispositive of Breeden's case, but only applies to the 1994 reorganization.

With respect to what happened in 1994, the School District seeks to minimize the basis for Breeden's complaint about Eldfrick's conduct, thereby making it appear that her concerns were not justified. For purposes of summary judgment, however, there is a much less benign view of the facts than the one that has been spun by the School District.

First, it is critical to recognize that Eldfrick's comments were made during a meeting with Breeden and her male subordinate, Jim McIntosh. By reading the Grand Canyon comment, shrugging his shoulders and staring at Breeden, then stating that he did not know what the comment meant, Eldfrick was obviously doing more than his job required, he was making a sexual joke at Breeden's expense. When McIntosh said, "I'll tell you later," and then both he and Eldfrick laughed, Eldfrick and McIntosh were acknowledging that the joke was inappropriate for Breeden to hear, and that she would be offended by the answer.

Whether the joke was sexual harassment or sex discrimination, it was clearly based upon sex and clearly Breeden was being treated differently because of her sex! A 38-year-old administrator is not required to put up with such school yard behavior, particularly when it undermines her position with her subordinate. Thus Breeden was right to be upset, and justified in complaining about what took place on October 21, 1994.

Furthermore, Breeden did not just complain about Eldfrick's conduct during the October 21, 1994 meeting. After she went to Eldfrick and told him she did not appreciate his behavior, Eldfrick changed his treatment of

her. After taking two weeks of Eldfrick's hostility and abuse, Breeden complained again, first to Goldman and then to Rice. It was after this second series of complaints that Breeden's job duties were dramatically changed. Thus to determine whether Breeden reasonably believed she was being subjected to unlawful conduct it is necessary to consider everything that happened during the two week period that led up to her second series of complaints, not just the events of October 21. See, e.g., *O'Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001) ("[W]here a plaintiff endures harassing conduct, although not explicitly sexual in nature, which undermines her ability to succeed at her job, those acts should be considered along with overtly sexually abusive conduct in assessing a hostile work environment claim.")

While the totality of Eldfrick's conduct during that two week period might not constitute a legally actionable hostile environment, it was certainly enough to give Breeden a reasonable belief that he was violating her rights based upon her sex. Furthermore, it was Goldman, not Breeden, who used the term "sexual harassment," and it was Rice, not Breeden, who involved the School District's affirmative action officer. If Goldman and Rice believed Breeden's complaints were sufficient to warrant involvement by the affirmative action officer, then it was certainly reasonable for Breeden to believe she was being subjected to conduct which violated Title VII.

The School District compares the facts in *Clover v. Total System Services, Inc.*, 176 F.3d 1346 (11th Cir. 1999), with the facts in Breeden's case, asserting that *Clover* somehow proves "[j]ust how far the panel majority departed from the approach consistently taken in the

other Circuits." That analogy is absurd. In *Clover* the plaintiff complained that she perceived a 17-year-old co-worker to be sexually harassed by a supervisor because there were visits without any business purpose and other non-sexual conduct. The Eleventh Circuit rightly found that this conduct could not reasonably be believed to constitute sexual harassment.

In contrast, Breeden did not complain about conduct she observed between a supervisor and a co-employee, she complained about conduct she experienced from her supervisor! There is no question but that Eldfrick's sexual joke was inappropriate given the presence of Breeden's male subordinate. Neither is there any question but that Eldfrick's conduct after Breeden complained was inappropriate. Thus it was certainly reasonable for Breeden to complain about Eldfrick's behavior, particularly given the School District's own employment discrimination regulations which defined sexual harassment to include "[u]ninvited sexual teasing, jokes or remarks or questions," along with "[r]etaliation against employees for complaining about [that behavior]." ER 177.

It is also important to remember that these incidents occurred in 1994, which in sexual harassment litigation was light years ago. The body of knowledge as to what constituted sexual harassment in 1994 was infinitely smaller than the body of knowledge today. Even so, this Court's recent pronouncements about the subject create something less than a bright line test, having given the following explanation:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships

> which are not fully captured by a simple recitation of the words used or the physical acts performed. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 82 (1998).

How is an employee to know when she has a "reasonable belief" she is being sexually harassed and subjected to abusive behavior based upon this standard?

### 2. Employees Subjected to Discriminatory Conduct Are Placed on the Horns of a Dilemma by the School District's Argument

Since this Court's rulings in the two recent cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), employees are now *required* to take advantage of employer policies to prevent or correct sexually harassing behavior, lest they become the losing party to the affirmative defense provided employers in those decisions. The identical holdings of these cases state:

> And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

*Ellerth*, 118 S.Ct. 2257 at 2270; *Faragher*, 118 S.Ct. 2275 at 2293.

Indeed, the EEOC's Enforcement Guidance, Number 915.002 (June 18, 1999), has been adopted to address the requirements established in *Faragher* and Ellerth. In this

Notice, the EEOC reiterated the rationale for the second prong of the affirmative defense, or the requirement that the employee exercise reasonable care by taking advantage of the employer's preventive/corrective opportunities. The EEOC Notice reads, in part:

> This element of the defense arises from the general theory "that a victim has a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute." *Id.* at 18.

The Notice further instructs, "The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the harassment before complaining to management." *Id.* Also stated in the Notice, and of relevance to the instant action, is the section regarding "Risk of Retaliation." In part, it reads:

> An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation . . . To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment. *Id.* at 19.

In its conclusion, the EEOC found that this Court's rulings create *"an incentive for employees to alert management about harassment before it becomes severe and pervasive."* *Id.* at 20 (emphasis added).

The *Faragher, Ellerth* and EEOC legal obligation requirement of employees to complain about sexually harassing activity before it becomes severe or pervasive

raises an interesting question regarding the legal standard established for engaging in "protected activity" under the opposition clause of Title VII. Namely, since the legal standard for retaliation under Title VII's opposition clause requires a reasonable, good faith belief that the employer has engaged in an unlawful employment practice, and the legal requirement under *Faragher* and *Ellerth* require employees to "take advantage" of employer preventive/corrective opportunities before the harassment becomes unlawful (severe and pervasive), what happens in the situation where the employee registers a complaint that may not evidence a "reasonable" belief that the employer is violating Title VII, but s/he does so to attempt to "prevent" and "correct" the existing behavior before it becomes unlawful, but then suffers retaliation because of it? According to the current legal standards, this individual would not have engaged in protected activity since s/he did not reasonably believe the behavior was severe enough to violate Title VII.

Likewise, what happens in the same situation if the employee does not complain or does not "take advantage" of the preventive/corrective policies soon enough? According to this Court and the EEOC, the employer would certainly hold that inaction against the employee if the behavior escalated to become severe or pervasive, and the employee would have no recourse against the affirmative defense in even the most heinous of sexual harassment cases. Of course, as the EEOC noted, the employee could advance a defense of fear of retaliation. But, this approach leaves the employee with the uneasy decision of either facing retaliation or being forced into the position of needing to advance a defense.

As sexual harassment has become a spotlight of legal and lay discussion in our society, it may become more and more difficult to resolve the described quandary. Employees may become privy to the reality that one or two instances of sexual-related misbehavior does not constitute sexual harassment under Title VII, but they will not be protected against retaliation if they uphold their legal obligation under *Faragher* and *Ellerth* and make their employer aware of the admitted "legal", but inappropriate, activity. On the other hand, if the employee does nothing, she will subvert her own claim for sexual harassment, if and when it materializes, by virtue of the employer's affirmative defense.

## CONCLUSION

Shirley Breeden acted appropriately when she complained to her supervisor after he offended and embarrassed her in front of her subordinate by making her the subject of a sexual joke. She also acted appropriately when she complained about her supervisor's abusive behavior which began immediately after her complaint. To condone what happened next, when Breeden's subordinates, including Jim McIntosh, the individual who participated in the joke, were taken away from her and given to her supervisor, Eldfrick, who had engaged in the inappropriate behavior, would send the exact wrong message to other employees who might be concerned about improper conduct on the part of their supervisor.

If this Court's rulings which require employers to notify employees of their rights and require employees to

exercise those rights are to have any meaning, then strong rules prohibiting retaliation must be required. Breeden served as the Director of Support Staff Services for four years prior to this incident, all the while having her job duties expand, not diminish, and yet within one month of her complaints her subordinates were taken away and her duties are dramatically changed. While the jury may ultimately conclude that the School District's actions were lawful, surely these facts are sufficient to allow a jury, not a judge, to decide the appropriateness of those actions.

Accordingly, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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(3)

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In The

# Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT,

*Petitioner,*

v.

SHIRLEY A. BREEDEN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

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M. Williams & R. Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, 28 Colorado Lawyer 59 (1999) ..... 2

## ARGUMENT

### A. "Adverse Employment Action": Breeden Concedes The Circuits Are Split And Does Not Dispute That The Other Indicia Relevant To Granting Certiorari Are Present

Breeden's Opposition is most telling in what she concedes and what she fails to address:

- Breeden concedes (Opp. 12-13) that the Circuit Courts are split on what constitutes an "adverse employment action" for purposes of the anti-retaliation provisions of Title VII [42 U.S.C. § 2000e-3(a)].[1]

- Breeden does not, and cannot, dispute that every Circuit now has weighed in on the issue, and thus the issue is ripe for review by this Court.

- Breeden does not discuss any of the cases decided by the Circuit Courts, other than the Ninth Circuit. Thus, she has not explained – nor can she – how the Ninth Circuit's recent "reasonably likely to deter employees from engaging in protected activity" definition of "adverse employment action"[2] can be reconciled with *either* the "ultimate employment action" definition used by the Fifth and Eighth Circuits[3] *or* the "materially adverse change in terms and conditions of employment" definition used by

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[1] *E.g., Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) ("The circuits are currently split as to what constitutes an adverse employment action."); *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 248 n.11 (4th Cir. 2000) ("The circuits are split as to whether an act of retaliation must be an 'ultimate employment decision' to qualify as an adverse employment action."); *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998) ("There is a split on the issue.")

[2] *Ray*, 217 F.3d at 1243.

[3] *E.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850, 854 (8th Cir. 2000).

the First, Second, Third, Fourth, Sixth, Seventh, Tenth and Eleventh Circuits.[4]

- Breeden does not dispute that Title VII retaliation claims are the fastest growing category of discrimination complaint[5] and thus there is a pressing need for this Court to decide the issue.

- Breeden does not dispute that the issue of what constitutes an "adverse employment action" for purposes of a Title VII retaliation claim was expressly decided by and preserved in the lower courts in this case. Nor does she dispute that this case presents the issue on a limited and manageable record.

In sum, Breeden does not take issue with a single one of the indicia that bear most critically on whether **certiorari** should be granted. Nor can she. This case presents an important issue in one of the most active areas of federal employment law. The issue has been addressed by all Circuit Courts of Appeals, and there is now a *three-* way split in the Circuits.

Instead, Breeden devotes her Opposition to arguing the "facts" – her pitch being this is so clear a case of retaliation that, no matter what the state of the law is or should be, she has an open and shut case. This is an interesting perspective, since not one of the four judges

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[4] *E.g., Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 446 (2d Cir. 1999); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Munday v. Waste Mgmt. Of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997); *Yates v. AVCO Corp.*, 819 F.2d 630, 638 (6th Cir. 1987); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857-58 (10th Cir. 2000); *Gupta v. Florida Bd. Of Regents*, 212 F.3d 571, 588 (11th Cir. 2000); *see also Hernandez-Torres v. Intercontinental Trading*, 158 F.3d 43, 47 (1st Cir. 1998); *Hill v. American Gen.*, 218 F.3d 639, 645 (7th Cir. 2000).

[5] E. I. Klein & R. Halligan, *A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventative Measures*, 71 N.Y. St. B.J. 51, 51 (1999); M. Williams & R. Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, 28 Colorado Lawyer 59, 59 (1999).

who have looked at this case agrees with her. Even the majority of the split Ninth Circuit panel that reversed summary judgment (Judges Canby and Reinhardt), said not once, but twice, "this is a close case," (Cert. Pet. App. 5-6) and said so while applying the most liberal definition of "adverse employment action" used in any Circuit. In other Circuits, this case would not even have been "close," and the summary judgment would have been affirmed.[6] The dissenting member of the Ninth Circuit panel (Judge Fernandez) also did not think this case was even close, but rather was an unfortunate example of a miffed employee making a mountain out of a molehill. (Cert. Pet. App. 8) The district court likewise concluded, after an exacting examination of the record, that Breeden's retaliation claim was meritless. (Cert. Pet. App. 9-12, 16-22)

The *record* also does not support Breeden's self-trumpeting argument, as her "factual" argument is rife with misstatements of the record. The following examples are illustrative:

Breeden claims that in 1997 she was appointed Director of Professional Development Education ("PDE") and reassigned to an older administration site – banished to "Siberia" – in "retaliation" for filing the instant lawsuit. Breeden denigrates both her administrative position and office location. (Opp. 7-8, 11-12) The uncontradicted evidence in the *record*, however, establishes the following: PDE – teacher training – is one of the most important of the School District's administrative functions. (ER 111) Not

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[6] *Compare, Galabya v. New York City Bd. Of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) (applying Title VII principles in ADEA case, transfer from one school to another and change from special education to mainstream assignment did not result in a change of responsibilities "so significant as to constitute a setback to the plaintiff's career"); *Place v. Abbott Laboratories*, 215 F.3d 803, 810 (7th Cir. 2000) (transfer from "interesting job" that the plaintiff liked to one she did not like and which lacked supervisory duties and loss of her personal cubicle and telephone did not constitute adverse employment action).

long before Breeden's appointment, the State of Nevada issued new student academic standards, and the School District adopted extensive written goals to further enhance the quality of educational services and student performance, thus putting even greater emphasis on PDE. (ER 134) The decisions to (a) upgrade the administrative position responsible for PDE to the Director level and (b) appoint Breeden to that position were made by Assistant Superintendent Dr. George Ann Rice (*not* by Donald Eldfrick who is the target of her "factual" argument). (ER 134, 75) When Dr. Rice proposed these decisions *she did not know* that Breeden had filed a lawsuit (ER 133); indeed, Dr. Rice talked to Breeden's union about this *before Breeden ever served her complaint*. (ER 133, 137) As Director of PDE, Breeden reported directly to Dr. Rice, rather than to one of Dr. Rice's subordinates as she had previously. Breeden's salary and benefits remained at the Director level, more than $74,000 per year for the 1997-1998 school year. (ER 131-132) She had to move offices to an older administrative site where PDE was already located and that housed most curriculum and instructional support services. (ER 111) Nor was Breeden the lone administrator; numerous administrators at her level – and *above* – had offices there including, two Area Superintendents, the Director of Elementary Academic Services, the Director of Secondary Academic Services, the Director of Multi-Cultural Community Outreach Education Programs, and the Director of School to Work Program. (ER 111)

Thus, the *record* shows that Breeden's new PDE position was equally – if not more – important than her prior job managing human resources matters. Furthermore, since Dr. Rice did not know Breeden had filed a lawsuit, there is not a shred of evidence this appointment was in "retaliation" for the lawsuit. Finally, while Breeden's new office was an older administrative site, she by no means was in outer "Siberia."

Breeden also claims that three years earlier, in 1994, her human resources job was changed in "retaliation" for her informal complaint about the momentary exchange

between Eldfrick and Jim McIntosh about the "Grand Canyon" quote in a psychological pre-hire report. Breeden asserts that before the change, she was responsible for "screening," "hiring" and "firing" all 5,000 of the School District's non-licensed personnel, including school police, and that this was her "primary" job duty. (Opp. 5-6) There is a notable lack of record citations in Breeden's paragraphs devoted to this. (*E.g.*, Opp. 5-6, 11) That is not surprising, since the uncontradicted evidence in the *record* shows that Breeden did *not* play a major role in non-licensed staff hiring, had *no* hiring or firing authority over the District's 5,000 support staff employees, and that her hiring role was only one of a number of duties she performed, all of which were of *equal* importance. (ER 133, 138, 241-244, 274-275)

Breeden admits that *work site administrators* (*e.g.*, school principals) worked directly with analysts and clerks (who processed paperwork (ER 241-244, 133, 138)), reviewed applicant records, interviewed and decided who to hire for positions. (ER 244,133) Breeden approved requests to advertise outside the District (ER 243), answered questions (but, was not the only administrator who could be consulted and could answer questions (ER 241, 243, 138)), and handled complaints about the process. (ER 241, 243-244) Breeden checked the paperwork (by clerks and analysts), but had to pass it along to Eldfrick for his final approval. (ER 138) Neither Breeden, nor the analysts and clerks reporting to her, were responsible for firing the District's support staff employees. (ER 133)[7]

Furthermore, Breeden has admitted that all her duties in connection with non-licensed support staff were *equally* important and provided *equal* job satisfaction. (ER 274-275) Even the analysts and assistants she regarded as her staff

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[7] Breeden and Eldfrick together oversaw school police officer hiring; Eldfrick had to approve everything (a function previously performed by Dr. Rice). (ER 192) Breeden remained involved in police officer background checks even after the changes in December 1994. (ER 277)

(later "taken away" from her) were not even just *her* staff – both Eldfrick and another Director assigned them work, supervised that work, and answered their questions (ER 138, 249-50), and Breeden herself did not use them in responding to unemployment claims or processing of leaves. (ER 240, 247)[8]

Breeden uses her overstated and unsupported recruiting duties argument as a backdrop for an attack on Eldfrick, who engaged in the momentary "Grand Canyon" exchange that Breeden found objectionable and who allegedly became "formal" and "cold" after she spoke with him about the remark. After their meeting, Breeden's and Eldfrick's relationship was strained, but her specific complaints are all over the map. *E.g.*, ER 304, 265, 305 (complaint about communicating only through written notes, while also questioning why he kept coming into her office to bring her work and admitting the notes in any event were not insufficient to provide direction); 280 (complaining Eldfrick did not invite her to a supervisor training class on recognizing impairment and "for-cause" drug testing, while admitting drug testing "was not one of my responsibilities"); and 293 (questioning why Eldfrick, who shook hands with employees when passing out paychecks, told Breeden's secretary while Breeden was out to give the paycheck to Breeden and "shake [Breeden's] hand."). *None* of this, however, constituted sexual harassment; indeed, Breeden did not even appeal on her harassment claim. (Cert. Pet. App. 13-16)

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[8] Breeden also misstates the record in asserting that after the 1994 reallocation of human resources duties, all she was left with was handling "unemployment and FMLA claims for support staff and licensed personnel." (Opp. 6) In fact, Breeden also worked with risk management on return-to-work issues, police officer background checks, and advertising. (ER 68-69, 279, 276-77) Breeden was in no way hampered in performing these responsibilities by any lack of staff support, as she had never utilized analysts or assistants in the unemployment and leave processes. (ER 240, 247)

Breeden features alleged romantic indiscretions by Eldfrick (one of which is based on nothing more than inadmissible rumor) and a supposed statement that no one would "get away" with a "charge" against him. (Opp. 2) Breeden's attack misses the mark.

Eldfrick did *not* make the decision to realign the functions in Human Resources and modify Breeden's duties. Dr. Rice made the decision to consolidate under one Director the handling of leaves, unemployment claims and working with Risk Management on worker's compensation claims for *all* District personnel (administrators, licensed personnel and support staff). (ER 74-75) Dr. Rice, likewise, decided to take these duties *away* from those who had previously handled them for administrators and licensed personnel, give them to Breeden and commensurately shift most non-licensed recruiting tasks to Eldfrick (ER 75), along with having the analysts and clerks report directly to him. (ER 138) Breeden has never even tried to explain why this consolidation did not make sense. Nor could she. These are technical areas where the governing law and regulations often change. Having one knowledgeable and proficient administrator was imminently reasonable. Nor has Breeden ever claimed that after this change she was not busy enough. She admits that FMLA leaves, alone, took 80-90 percent of her time. (ER 276) There is, in short, no evidence that Dr. Rice, a woman herself, was "retaliating" against Breeden when she gave her these District-wide responsibilities.

Furthermore, Eldfrick's supposed romantic indiscretions have no bearing whatsoever on "retaliation" against Breeden. And with respect to Eldfrick's supposed statement that no one "would get away with" a "harassment" charge, Breeden fails to disclose that this controversy had *nothing* to do with sexual harassment, but arose out of a dispute over whether certain clerical duties were "beneath" another employee's job classification. (ER 209)

Given the *record*, unadorned by embellishment or overstatement, the summary judgment should have been

affirmed even under the Ninth Circuit's expansive definition of "adverse employment action." The judgment certainly would have been affirmed had the Ninth Circuit panel employed either of the two more limited definitions used by the other Circuits.

### B. "Opposition Clause": Breeden All But Invites The Court To Provide Guidance

Breeden's response on what constitutes a "reasonable belief" that a Title VII violation occurred supporting a retaliation claim under Title VII's "Opposition Clause" also eschews any discussion of the state of the law. She addresses neither the divergence of the case law on this question within the Ninth Circuit, itself, nor case law in other Circuits with which the Ninth Circuit has parted company.

Instead, Breeden raises a procedural straw man, makes a completely new argument she never made on appeal, and finally suggests that "an interesting question" concerning the "Opposition Clause" is raised by the Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Breeden's first two arguments provide no pause as to the appropriateness of granting certiorari in this case. Her last argument is an invitation to take the case.

Breeden first argues that whether she engaged in protected activity under the "Opposition Clause" is a moot point, since she claims "retaliation" for filing this lawsuit in 1997 that is protected under the "Participation Clause." (Opp. 14) Breeden is wrong. She cannot keep her retaliation case intact by relying only on the 1997 lawsuit. First, she cannot use her 1997 lawsuit as the platform for a "retaliation" claim for the 1994 change in duties. This would be putting the cart before the horse. Second, the School District never disputed that Breeden's 1997 lawsuit filing was "protected activity" under the "Participation Clause." Rather, the problem with her claim of post-lawsuit

retaliation is that Dr. Rice, who made the decision to put Breeden in charge of PDE, commenced that change *before* Breeden filed suit; indeed, Dr. Rice spoke with Breeden's union about the change *before* Breeden ever served her complaint. (ER 133, 137) Thus, there is no *causal* relationship between Breeden's lawsuit and her PDE appointment.

Breeden next argues that more than the momentary exchange about the "Grand Canyon" remark must be taken into account in determining whether she "reasonably believed" she had been subjected to sexual harassment. Almost as though she were conceding that that brief exchange is not enough to give rise to a reasonable belief that she was subjected to sexual harassment, Breeden contends that two weeks of allegedly "cold" treatment by Eldfrick should be added to the equation. (Opp. 15-16) This is an argument that Breeden never made on appeal to the Ninth Circuit. On the contrary, Breeden focused *only* on the exchange about the "Grand Canyon" remark. (AOB 17-19) Thus, she has waived the argument. *E.g., Holly Farms Corp. v. National Labor Relations Labor Bd.*, 517 U.S. 392, 400 n.7 (1996) (petitioner failed to advance argument on appeal; Court " 'generally [does] not address arguments that were not the basis for the decision below' "). Furthermore, being "formal" and "cold" is *not* sexual harassment. *E.g., Saxton v. American Telephone and Telegraph Co.*, 10 F.3d 526, 534-35 (7th Cir. 1993) ("even if we assume that Richardson turned a particularly cold shoulder to Saxton . . . , the evidence does not suggest that this behavior rendered her environment hostile"). Thus, Breeden gets no mileage from trying to "tack on" Eldfrick's alleged two-week "coldness" to the momentary exchange about the "Grand Canyon" remark.

Breeden lastly argues that *Faragher* and *Ellerth* put employees on the "horns of a dilemma" if conduct must come "close" to violating Title VII in order for a complaint to be "protected activity" under Title VII's "Opposition Clause." Breeden asserts that *Faragher* and *Ellerth* require complaints be made early to prevent questionable conduct

from becoming unlawful, but will not be "protected activity" under the close-to-actually-violating Title VII standard, thus leaving employees exposed to retaliation without redress for fulfilling their supposed *Faragher* and *Ellerth* early-reporting duty. (Opp. 18-21)

This is an argument *inviting* review by this Court. If the close-enough standard used by the majority of Circuit Courts to determine whether an employee has engaged in protected activity under the "Opposition Clause"[9] is at odds with *Faragher* and *Ellerth* and puts employees in a "quandary," as Breeden maintains, this Court should address the question. The School District does not agree with Breeden that *Faragher* and *Ellerth* create tension in the law. Rather, the tension is between the line of Ninth Circuit cases brought to bear by the panel majority in this case, and the approach taken in other Ninth Circuit cases and used in the vast majority of other Circuits. *This* problem, which Breeden ignores, merits the grant of certiorari.

## CONCLUSION

Every factor that warrants a grant of certiorari is present in this case. The School District respectfully requests that its petition be granted.

Respectfully submitted,

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[9] *E.g., Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 705 (7th Cir. 2000); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999).

Per Curiam

# SUPREME COURT OF THE UNITED STATES

## CLARK COUNTY SCHOOL DISTRICT *v.* SHIRLEY A. BREEDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00–866. Decided April 23, 2001

PER CURIAM.

Under Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended, 42 U. S. C. §2000e–3(a), it is unlawful "for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." In 1997, respondent filed a §2000e–3(a) retaliation claim against petitioner Clark County School District. The claim as eventually amended alleged that petitioner had taken two separate adverse employment actions against her in response to two different protected activities in which she had engaged. The District Court granted summary judgment to petitioner, No. CV–S–97–365–DWH(RJJ) (D. Nev., Feb. 9, 1999), but a panel of the Court of Appeals for the Ninth Circuit reversed over the dissent of Judge Fernandez, No. 99–15522, 2000 WL 991821 (July 19, 2000) *(per curiam)* (unpublished), judgt. order reported at 232 F. 3d 893. We grant the writ of certiorari and reverse.

On October 21, 1994, respondent's male supervisor met with respondent and another male employee to review the psychological evaluation reports of four job applicants. The report for one of the applicants disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Can-

yon." Brief in Opposition 3. At the meeting respondent's supervisor read the comment aloud, looked at respondent and stated, "I don't know what that means." *Ibid.* The other employee then said, "Well, I'll tell you later," and both men chuckled. *Ibid.* Respondent later complained about the comment to the offending employee, to Assistant Superintendent George Ann Rice, the employee's supervisor, and to another assistant superintendent of petitioner. Her first claim of retaliation asserts that she was punished for these complaints.

The Court of Appeals for the Ninth Circuit has applied §2000e–3(a) to protect employee "oppos[ition]" not just to practices that are actually "made . . . unlawful" by Title VII, but also to practices that the employee could reasonably believe were unlawful. 2000 WL 991821, at *1 (stating that respondent's opposition was protected "if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment"); *Trent* v. *Valley Electric Assn. Inc.*, 41 F. 3d 524, 526 (CA9 1994). We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.

Title VII forbids actions taken on the basis of sex that "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U. S. C. §2000e–2(a)(1). Just three Terms ago, we reiterated, what was plain from our previous decisions, that sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" *Faragher* v. *Boca Raton*, 524 U. S. 775, 786 (1998) (quoting *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67 (1986) (some internal quotation marks omitted)). See also *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 752 (1998) (Only harassing conduct that is "se-

vere or pervasive" can produce a "constructive alteratio[n] in the terms or conditions of employment"); *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U. S. 75, 81 (1998) (Title VII "forbids only behavior so objectively offensive as to alter the 'conditions' of the victim's employment"). Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher* v. *Boca Raton*, *supra*, at 787–788 (quoting *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 23 (1993)). Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher* v. *Boca Raton*, *supra*, at 788 (citation and quotation marks omitted).

No reasonable person could have believed that the single incident recounted above violated Title VII's standard. The ordinary terms and conditions of respondent's job required her to review the sexually explicit statement in the course of screening job applicants. Her co-workers who participated in the hiring process were subject to the same requirement, and indeed, in the District Court respondent "conceded that it did not bother or upset her" to read the statement in the file. App. to Pet. for Cert. 15 (District Court opinion). Her supervisor's comment, made at a meeting to review the application, that he did not know what the statement meant; her co-worker's responding comment; and the chuckling of both are at worst an "isolated inciden[t]" that cannot remotely be considered "extremely serious," as our cases require. *Faragher* v. *Boca Raton*, *supra*, at 788. The holding of the Court of Appeals

to the contrary must be reversed.

Besides claiming that she was punished for complaining to petitioner's personnel about the alleged sexual harassment, respondent also claimed that she was punished for filing charges against petitioner with the Nevada Equal Rights Commission and the Equal Employment Opportunity Commission (EEOC) and for filing the present suit. Respondent filed her lawsuit on April 1, 1997; on April 10, 1997, respondent's supervisor, Assistant Superintendent Rice, "mentioned to Allin Chandler, Executive Director of plaintiff's union, that she was contemplating transferring plaintiff to the position of Director of Professional Development Education." App. to Pet. for Cert. 11–12 (District Court opinion); and this transfer was "carried through" in May. Brief in Opposition 8. In order to show, as her defense against summary judgment required, the existence of a causal connection between her protected activities and the transfer, respondent "relie[d] wholly on the temporal proximity of the filing of her complaint on April 1, 1997 and Rice's statement to plaintiff's union representative on April 10, 1997 that she was considering transferring plaintiff to the [new] position." App. to Pet. for Cert. 21–22 (District Court opinion). The District Court, however, found that respondent did not serve petitioner with the summons and complaint until April 11, 1997, one day *after* Rice had made the statement, and Rice filed an affidavit stating that she did not become aware of the lawsuit until after April 11, a claim that respondent did not challenge. Hence, the court concluded, respondent "ha[d] not shown that any causal connection exists between her protected activities and the adverse employment decision." *Id.*, at 21.

The Court of Appeals reversed, relying on two facts: The EEOC had issued a right-to-sue letter to respondent three months before Rice announced she was contemplating the transfer, and the actual transfer occurred one month after

Rice learned of respondent's suit. 2000 WL 991821, at *3. The latter fact is immaterial in light of the fact that petitioner concededly was contemplating the transfer before it learned of the suit. Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.

As for the right-to-sue letter: Respondent did not rely on that letter in the District Court and did not mention it in her opening brief on appeal. Her demonstration of causality all along had rested upon the connection between the transfer and the filing of her lawsuit—to which connection the letter was irrelevant. When, however, petitioner's answering brief in the Court of Appeals demonstrated conclusively the lack of causation between the filing of respondent's lawsuit and Rice's decision, respondent mentioned the letter for the first time in her reply brief. Reply Brief in No. 99–15522 (CA9) pp. 9–10. The Ninth Circuit's opinion did not adopt respondent's utterly implausible suggestion that the *EEOC*'s issuance of a right-to-sue letter—an action in which the employee takes no part—is a protected activity of the employee, see 42 U. S. C. §2000e–3(a). Rather, the opinion suggests that the letter provided petitioner with its first notice of respondent's charge before the EEOC, and hence allowed the inference that the transfer proposal made three months later was petitioner's reaction to the charge. See 2000 WL 991821, at *3. This will not do.

First, there is no indication that Rice even knew about the right-to-sue letter when she proposed transferring respondent. And second, if one presumes she knew about it, one must also presume that she (or her predecessor) knew *almost two years earlier* about the protected action (filing of the EEOC complaint) that the letter supposedly disclosed. (The complaint had been filed on August 23,

1995, and both Title VII and its implementing regulations require that an employer be given notice within 10 days of filing. 42 U. S. C. §§2000e–5(b), (e)(1); 29 CFR §1601.14 (2000).) The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be "very close," *O'Neal* v. *Ferguson Constr. Co.*, 237 F. 3d 1248, 1253 (CA10 2001). See *e.g.*, *Richmond* v. *Oneok, Inc.*, 120 F. 3d 205, 209 (CA10 1997) (3-month period insufficient); *Hughes* v. *Derwinski*, 967 F. 2d 1168, 1174–1175 (CA7 1992) (4-month period insufficient). Action taken (as here) 20 months later suggests, by itself, no causality at all.

In short, neither the grounds that respondent presented to the District Court, nor the ground she added on appeal, nor even the ground the Court of Appeals developed on its own, sufficed to establish a dispute substantial enough to withstand the motion for summary judgment. The District Court's granting of that motion was correct. The judgment of the Court of Appeals is reversed.

*It is so ordered.*